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In the

Supreme Court Of The United States

October Term, 1960

No. 200

TRAYTON L. LATHROP,

Appellant,

vs.

JOSEPH D. DONOHUE,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

BRIEF FOR APPELLEE

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

BRIEF FOR APPELLEE

OPINIONS BELOW

The opinion of the Supreme Court of Wisconsin (R. 66-81) is reported at 10 Wis. 2d 230, 102 N. W. 2d 404. The opinion and judgment of the trial court (R. 49-64) are not reported.

JURISDICTION

In its order of October 10, 1960 in this case, the Court directed that further consideration of the question of jurisdiction be postponed to the hearing on the merits (R. 85). Accordingly, we address ourselves at the outset to the question of jurisdiction, pursuant to Rule 16 (4) of this Court.

1. A State "Statute" under § 1257 (2) Refers to Legislative Action.

This appeal is taken under 28 U. S. C. § 1257 (2), which permits review of the final judgments of the highest court of a state as follows:

> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

The important word in this subsection, insofar as this case is concerned, is "statute." It is only the review of a *statute* of a state which is authorized.

The reference in § 1257 (2) to a state statute has a well-defined meaning under the cases. It signifies state *legislative* action in some form, but is not limited to laws passed by a legislature. *Williams v. Bruffy*, 96 U. S. 176, 183. Thus, the order of a state department or board may be a statute in the exercise of delegated legislative authority. *Bluefield Co. v. Pub. Serv. Comm.*, 262 U. S. 679, 683; *Lake Erie & W. R. R. Co. v. Pub. Util. Comm.*, 249 U. S. 422, 424. Municipal ordinances also fall within the same category.

King Mfg. Co. v. Augusta, 277 U. S. 100, 102-114; *Jamison v. Texas*, 318 U. S. 413, 414.

The test in these cases is whether the particular action proceeds from the legislative power of the state. It may emanate from delegated legislative authority, as in the case of action by state boards and by municipalities, or from direct enactment by the legislature, or by action creating or amending state constitutional provisions. *King Mfg. Co. v. Augusta, supra*, 103-104. Not every order of a state agency, of course, is a statute within the meaning of § 1257 (2). It must possess legislative characteristics and not be merely fact-finding or informational in nature. *Ex Parte Williams*, 277 U. S. 267, 271-273.

With respect to a state public service commission fixing water rates, this Court said, "The prescribing of rates is a legislative act. The commission is an instrumentality of the State, exercising delegated powers. Its order is of the same force as would be a like enactment by the legislature." *Bluefield Co. v. Pub. Serv. Comm., supra*, 683. In *King Mfg. v. Augusta, supra*, 102-114, this Court held that the word "statute" for appeal jurisdiction was not limited to acts of a legislature but included municipal ordinances, citing many cases to the effect that such ordinances, like orders of state boards and commissions, were an exercise of legislative power delegated by the state legislature.

In this connection, it should be noted that strong objection was expressed by certain members of the Court to extending appeal jurisdiction to cases involving city ordinances and the orders of state boards and commissions, particularly in view of the legislative history of the appeal

statute. Prior to the act of February 13, 1925, c. 229, 43 Stat. 936, 937, § 237 (a) of the Judicial Code provided for review on writ of error "where is drawn in question the validity of a statute of, *or an authority exercised under* any state, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity." (Emphasis added) The act of February 13, 1925 struck out the words "or an authority exercised under" any state, leaving the language as in the present § 1257 (2).

To Justices Brandeis and Holmes this change indicated a restriction of jurisdiction to statutes enacted by a state legislative body, especially in view of the well-known purpose at the time to reduce the volume of cases coming before the Court on appeal. Accordingly, they dissented vigorously in *King Mfg. Co. v. Augusta, supra,* at 115, protesting against stretching the words "statute of any state" to cover municipal ordinances.[1] They also dissented in *Sultan Ry. Co. v. Dept. of Labor,* 277 U. S. 135, 137, where the order of a state bureau was held to be a state statute.

Thus, the meaning of "statute of any state" has embraced legislative action of varying kinds and not simply acts adopted by a legislature; but the term has never been held to apply to judicial acts.

---

[1] "I cannot believe that if Congress had intended to maintain our jurisdiction to review judgments sustaining such ordinances on writ of error, it would not have found clearer language in which to express its purpose," said Mr. Justice Brandeis (p. 116).

2. The Orders Drawn in Question in this Case are not a "Statute" under § 1257 (2) because they Constitute Judicial and not Legislative Action.

In the instant case we are not dealing with *legislative* action of any kind or form. Appellant challenges the orders or rules of the Wisconsin Supreme Court integrating the bar and states in his brief (p. 3) that § 1257 (2) is applicable "unless it can be said that said rules do not constitute a statute."

Such orders or rules do not constitute a statute, it is submitted, because they are judicial in nature and emanate from the judicial power of the state. They constitute *judicial* action by the Wisconsin Supreme Court in the exercise of its inherent authority over the practice of law. *In re Integration of Bar*, 273 Wis. 281, 283, 77 N. W. 2d 602, 603 (involving the first order of integration); *In re Integration of Bar*, 5 Wis. 2d 618, 622, 624-625, 93 N. W. 2d 601, 603, 604-605 (ordering integration continued on a permanent basis).

The issue whether integration was a matter for legislative or judicial action was raised squarely in the first of four integration cases. *Integration of Bar Case*, 244 Wis. 8, 36-54, 11 N. W. 2d 604, 617-625. The 1943 legislature passed a statute providing for integration of the bar and for implementation by orders of the Wisconsin Supreme Court,[*] reading as follows:

"256.31 State Bar of Wisconsin. (1) There shall be an association to be known as the 'State Bar of Wisconsin' composed of persons licensed to practice law in this

[*]The act, c. 315, Laws of 1943, became Sec. 256.31, Wis. Stats.

state, and membership in such association shall be a condition precedent to the right to practice law in Wisconsin.

"(2) The supreme court by appropriate orders shall provide for the organization and government of the association and shall define the rights, obligations and conditions of membership therein, to the end that such association shall promote the public interest by maintaining high standards of conduct in the legal profession and by aiding in the efficient administration of justice."

The court reviewed the history of integration efforts in Wisconsin, decided that § 256.31 was enacted validly and did not violate the Fourteenth Amendment to the Federal Constitution, and then turned to the issue of whether bar integration involves a legislative or judicial power. It acknowledged that the legislature had the power to impose minimum qualifications for attorneys in the exercise of the police power, but stated that the ultimate responsibility over the bar rested with the judicial department. With respect to integration, it said that the power to integrate the bar is an incident to the exercise of the judicial power vested by the constitution in the courts, and that "it has been held by every court to which the question has been presented that the court has power to integrate the bar and that the integration of the bar is a judicial and not a legislative function," citing many cases. 244 Wis. 8, 40-41, 11 N. W. 2d 604, 619.

It discussed the effect of the statute passed by the legislature with much tact, concluding that it was a legislative declaration that bar integration would promote the general welfare and not "an attempt by the legislature to

invade the province of the court or to dictate to it." 244 Wis. 8, 52-53, 11 N. W. 2d 604, 624. Despite such declaration of the legislature, however, the court declined to order integration because so many attorneys were then in the military service. 244 Wis. 8, 54-55, 11 N. W. 2d 604, 624-625.

In the second integration case the court again referred to § 256.31 as a legislative declaration but again declined to follow it and order integration, for reasons which it repudiated later. At the same time it made clear that it did have the inherent or implied judicial power to order integration if the exigencies called for it. *In re Integration of Bar*, 249 Wis. 523, 527-528, 25 N. W. 2d 500, 502.

In 1956 the court concluded to order integration for a trial period. *In re Integration of Bar*, 273 Wis. 281, 77 N. W. 2d 602. Rules were adopted by order of the court, effective January 1, 1957, bringing the State Bar into existence and declaring (§ 1, Rule 1) that they "are adopted in exercise of the court's inherent authority over members of the legal profession as officers of the court" (R. 7).

After two years of integration the Wisconsin Supreme Court, in the fourth integration case, ordered the State Bar to be continued because it had functioned so successfully. Again it asserted its inherent power over the bar, not only for creating and continuing the State Bar but also for taking remedial action if any activities should be engaged in which might be out of harmony with integration objectives or otherwise contrary to the public interest. *In re Integration of Bar*, 5 Wis. 2d 618, 624-625, 93 N. W. 2d 601, 604-605.

Thus, it is quite plain from the above cases that the action in Wisconsin integrating the bar was judicial and

not legislative in character. Other courts have also held that integration is a judicial function based upon inherent power. *Petition of Florida State Bar Ass'n.*, 40 S. 2d 902, 905-906; *Petition for Integration of Bar of Minn.*, 216 Minn. 195, 198-200, 12 N. W. 2d 515, 517-518; *In re Integration of Nebraska State Bar Ass'n.*, 133 Neb. 283, 286-289, 275 N. W. 265, 266-268; *In re Integration of State Bar of Oklahoma*, 185 Okla. 505, 506-507, 95 P. 2d 113, 114-116. In fact, the more recent trend has been to accomplish integration solely by order of the court under its inherent judicial power with respect to the practice of law.[3]

3. Appellant Ignores the Distinction between Legislative and Judicial Acts and Seeks to Extend § 1257 (2) to all Actions of a State.

Appellant concedes that § 1257 (2) refers only to the exercise of legislative authority, but his argument is that anything which has the effect of law is legislative in character. He conjures up the phrase, "rule making power of a state," and simply states that it encompasses acts of the legislature as well as the courts, and thus there is really no difference between them.[4]

He ignores the fundamental constitutional concept of the division of governmental powers. The Wisconsin Constitution, Art IV, § 1, declares that "The legislative power shall be vested in a senate and assembly." Similarly, Art

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[3]As in the case of Florida, Missouri, Nebraska, Oklahoma, the Virgin Islands, and Wisconsin. The older integrated bars were established by state statute or by a combination of statute and court rules, without attempt to question the basic authority for so doing. See Winters, **Bar Association Organization and Activities**, 9-11 (1954).

[4]Appellant's Brief, 4-5.

VII, § 2, provides that "The judicial power of this state, both as to matters of law and equity, shall be vested in a supreme court, circuits courts, courts of probate, and in justices of the peace." The separation of powers is fundamental to our whole political system, but appellant would obliterate the distinction between judicial and legislative authority with reference to § 1257 (2).

None of the cases he cites with respect to § 1257 (2) deals with judicial acts. All have to do with legislative action in one form or another. The kinds of legislative acts within the purview of the appeal statute are well summed up in the following language (part of which is quoted by appellant on page 6 of his brief as authority for his position) of *King Mfg. Co. v. Augusta*, 277 U. S. 100, 103-104:

> "It of course rests with each State to determine in what form and by what agencies its legislative power may be exerted. *It may legislate little or much in its constitution, may permit the electorate to make laws by direct vote, may entrust its legislature with wide law-making functions and may delegate legislative authority to subordinate agencies, such as municipal councils and state commissions.* But whether this power be exerted in one form or another, or by one agency or another, the enactments put forth, whether called constitutional provisions, laws, ordinances or orders, are in essence legislative acts of the State; they express its will and have no force otherwise." (Emphasis added)

Appellant also refers to *Hamilton v. University of California*, 293 U. S. 245. That case involved both an act of the California legislature and an order pursuant thereto

issued by the Board of Regents, a state agency with delegated legislative authority.

The appellant would have this Court go a long step beyond previous cases and hold that the integration orders of the Wisconsin Supreme Court are state *statutes*. True, they have the effect of law, but that may be said generally of all judicial action. Every order, decree, and judgment of a court has the force of law. When a legal principle is laid down by a court or an old one changed, it has status and authority similar to an act of the legislature. A common law rule may be over-turned or modified, with widespread results and the full force of law. That is not to say, however, that the court is exercising a legislative function, even when it is construing a state statute.

A contention similar to appellant's has been made with respect to the provision in Art. I, § 10, of the United States Constitution that "No state shall . . . pass any . . . law impairing the obligation of contracts. . . ." It has been argued that this embraces judicial as well as legislative acts. However, this contention has been rejected, and it is well-settled that the prohibition is directed only against impairment by legislation and not by judicial action. *Tidal Oil Co. v. Flanagan*, 263 U. S. 444, 451; *Barrows v. Jackson*, 346 U. S. 249, 260.

In view of the legislative history of § 1257 (2), the cases holding that "statute of any state" means legislative action of some kind, and the traditional distinction between legislative and judicial functions, we submit it would pervert the intent of Congress to construe the appeal statute as including judicial action.

4. Certiorari Should not be Granted.

This Court can, of course, consider the appeal papers as certiorari under § 2103. However, we submit that certiorari should not be granted because there is no substantial question as to the constitutionality of the State Bar of Wisconsin, for the reasons stated in our brief on our motion to dismiss (11-28) and as will be demonstrated in the argument of this brief. The decision of this Court in *Railway Employes' Dept. v. Hanson*, 351 U. S. 225 on the all-union shop and the unanimity of the many cases in state courts on the constitutionality of bar integration, it seems to us, remove the issue from the realm of doubt.

In addition, appellant challenges certain activities of the State Bar as to which the record is bare and fragmentary with respect to his contentions, and as to which he has an adequate remedy in the state court. This is discussed in subsequent portions of this brief (*infra*, pp. 48, 65-69).

QUESTION PRESENTED

Whether the orders or rules of the Wisconsin Supreme Court integrating the bar of that state violate the Fourteenth Amendment to the Federal Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of

the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The First Amendment to the Constitution of the United States, which is pertinent in connection with the Fourteenth Amendment, provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT OF THE CASE

This is a direct appeal from the final judgment of the Wisconsin Supreme Court entered on April 5, 1960 (R. 65-66), holding that the orders or rules of that court integrating the bar of the state are constitutional, and affirming the judgment of the circuit court entered on October 23, 1959, which dismissed appellant's complaint.

In 1956, upon petition of members of the bar and after a hearing, the Wisconsin Supreme Court decided to integrate the bar for a trial period of two years (R. 2-3), under its inherent authority over attorneys as officers of the court. *In re Integration of the Bar*, 273 Wis. 281, 285, 77 N. W. 2d 602, 604. In accordance with that decision and after a further hearing, the court entered an order on December

7, 1956, (273 Wis. p. vii, with an accompanying opinion at 273 Wis. p. viii, 79 N. W. 2d 441) promulgating rules and by-laws for the State Bar of Wisconsin (R. 7-40).

The purposes of the State Bar are set forth in Rule 1, § 2 (R. 8) as follows:

> "The purposes of the association shall be to aid the courts in carrying on and improving the administration of justice; to foster and maintain on the part of those engaged in the practice of law high ideals of integrity, learning, competence and public service and high standards of conduct; to safeguard the proper professional interests of the members of the bar; to encourage the formation and activities of local bar associations; to provide a forum for the discussion of subjects pertaining to the practice of law, the science of jurisprudence and law reform, and the relations of the bar to the public, and to publish information relating thereto; to the end that the public responsibilities of the legal profession may be more effectively discharged."

The rules and by-laws require enrollment in the State Bar and the payment of annual dues by every attorney licensed or admitted to practice law (R. 8-10, 27-29). The membership consists of active members and inactive members, and only the former can practice law and can vote in bar elections. Inactive members are those who are eligible for active membership but are not engaged in the practice and request enrollment in the inactive class. Judges of courts of record not engaged in the practice of law are inactive members (R. 9). If the annual dues of a member are not paid, the member is subject to suspension and during suspension he may not practice law (R. 10, 29).

The officers are elected annually by the members by mail ballot (R. 10-12, 30-31). The affairs of the State Bar are managed by a board of governors consisting of the officers and the immediate past-president and 29 members elected from 9 districts of the state by mail ballot. The term of each governor is two years, and no governor may be elected for more than two consecutive terms (R. 12-14, 31-33).

Provision is made for meetings of the board (R. 14, 33-34), the executive committee (R. 16-17), and of the members (R. 17-18). A referendum procedure is established for submitting matters to the members for determination by mail ballot, which can be initiated in several different ways (R. 18-19).

Provision is also made for various standing committees dealing with legal education and bar admissions, post-graduate eduction, the administration of justice, the study of judicial selection, tenure, and compensation, professional ethics, public services, inter-professional and business relations, grievances, legislation, legal aid for the indigent, the unauthorized practice of law, the State Bar Bulletin, and other publications (R. 14-16, 34-37). In addition, sections are established dealing with specific fields of law (R. 15-16, 37-39).

Extensive machinery is set up for the handling of grievance complaints, petitions for reinstating disbarred or suspended attorneys, and other matters by district grievance committees (R. 20-25), but the power to suspend or disbar remains with the Supreme Court. Complaints found to warrant disciplinary action are forwarded to the State Bar Commissioners for further proceedings (R. 21-22), and

findings and recommendations with respect to reinstatement of suspended or disbarred lawyers, together with the recommendations of the board of governors, are forwarded to the Wisconsin Supreme Court (R. 23).

Appellant seeks to give the impression by use of the word "substantially" that the services and activities of the State Bar are the same as the prior voluntary bar (Appellant's Brief 9, 17). The court below took pains to point out some of the differences, such as in the fields of legislative activity (R. 73), unauthorized practice (R. 79), and grievance investigations (R. 81).

At the end of the two-year trial period of integration a further hearing was held by the Wisconsin Supreme Court. It found that integration had proved successful and none of the fears of objectors had materialized, and on December 22, 1958 ordered it continued on a permanent basis (R. 40-47). *In re Integration of the Bar*, 5 Wis. 2d 618, 621, 93 N. W. 601, 602-603.

Appellant enrolled in the State Bar and paid his annual dues of $15.00 in 1957 and 1958 (R. 3). The following year, however, he paid his dues under protest (R. 6), and on June 8, 1959 commenced this action in the circuit court to recover them from the appellee, then the treasurer of the State Bar (R. 1). The complaint (R. 1-48) is replete with generalizations, but its gravamen seems to be that the State Bar engages in legislative activities, and compulsory membership in it is unconstitutional (R. 5-7).

The appellee (defendant) demurred to the complaint upon three grounds, namely, (1) that the circuit court lacked jurisdiction over the subject matter of the action

because exclusive jurisdiction is vested in the Wisconsin Supreme Court, (2) that there was a defect of parties defendant in that the State Bar is a necessary party, and (3) that the complaint did not state a cause of action in any event (R. 49). The circuit court sustained all three grounds of demurrer and dismissed the complaint (R. 49-64). It expressly held that integration did not violate any provision of the United States or Wisconsin Constitutions (R. 61-63).

Appellant then appealed to the Supreme Court of Wisconsin which affirmed the judgment of the circuit court. Although it agreed that the lower court did not have jurisdiction, the Supreme Court decided the constitutional issue as if the action had been started originally and properly in its court (R. 68, 77), but at the same time ordered that the judgment of the trial court be affirmed (R. 77).

The Wisconsin Supreme Court in its decision held:

1. That the rules and by-laws of the State Bar do not compel appellant to associate with anyone or restrict his freedoms in any way (R. 70).

2. That the "right" to practice law is not a right but a privilege subject to regulation within constitutional limits (R. 71).

3. That the annual dues of members of the State Bar are in the same class as an annual license fee imposed upon any occupation or profession which is subject to state regulation (R. 71).

4. That the legislative activities of the State Bar are limited by the rules and by-laws adopted by the court; that the court has examined all of such activities since integration and takes judicial notice that in every

instance the legislative measures supported or opposed by the State Bar dealt only with the administration of justice, court reform, and legal practice; and that it is in the public interest for the profession to give its composite judgment on measures in these fields, a function which can be performed much more effectively by an integrated bar than a voluntary bar association (R. 71-74).

5. That the State Bar is a public agency, and insofar as constitutionality is concerned, there is no distinction between the advocacy of legislation by it and by the State Judicial Council, which is supported by tax revenues (R. 75-76).

6. That integration is a form of regulation by the court in the exercise of its inherent authority over the profession; that such regulation does not infringe upon appellant's freedoms; and that the annual license fee is but a slight inconvenience far outweighed by the public interest served (R. 74-75).

7. That experience with integration in various states since 1921 shows there is no ground for appellant's fears that integration will lead to syndicalism *(sic)* (R. 77).

8. Therefore, the integration orders violate none of the First Amendment freedoms embodied in the due-process and equal-protection clauses of the Fourteenth Amendment (R. 77).

The court also attached to its opinion an appendix analyzing a number of the activities of the State Bar and the public purposes served thereby (R. 77-81).

Appellant appealed to this Court (R. 82-84) and filed his jurisdictional statement. Appellee moved to dismiss. On October 10, 1960 the Court ordered that further considera-

tion of the question of jurisdiction be postponed to th. hearing on the merits (R. 85).

SUMMARY OF ARGUMENT

I.

Examining the history of the integrated bar, we see that it is not a new or radical idea. It comes to us from England, where the ancient Inns of Court developed because of the need to provide training for the profession and maintain discipline. The courts felt that more effective regulation could be exercised by an organized profession in the form of the Inns and long ago delegated such power to them. Today no barrister may practice without being a member of one of the four Inns, and they decide who shall be admitted and have power to suspend or disbar. The other branch of the profession, the solicitors, is governed by The Law Society, which regulates the training and admission of the solicitor and may remove, suspend, or fine him. Both the Inns and the Society have powers and duties with respect to the profession, especially as to admission and discipline, far beyond those of any bar organization in this country. They are responsible for the excellent standards and traditions of the profession in England today.

Every province in Canada also has an integrated bar modelled after the English system. In fact, the Canadian organization so impressed Harley of the American Judicature Society that in 1914 he embarked upon a crusade for the integrated bar in this country. Spurred on by the difficulties and ineffectiveness of voluntary associations, the

idea caught fire and leading figures of the profession rallied to the cause. In 1921 North Dakota became the first state to have an integrated bar. Today there are integrated bars in 27 states, Puerto Rico and the Virgin Islands, and Dean Pound states that the ultimate high point of the profession will be gained when all the states are integrated. Integration has stood the test of experience, for no integrated bar state has gone back to the voluntary association.

II.

The practice of law is a profession inextricably bound up with the administration of justice. Accordingly, those who practice are officers of the court subject to regulation and discipline to safeguard the public interest in the judicial process. The practice has generally been held by the courts to be a privilege burdened with conditions and not open to all as a matter of vested or constitutional right. The profession must comply strictly with qualifications, standards, and conditions, which may be laid down by the legislature as minimum requirements, but as to which the ultimate power of regulation rests with the judiciary. It is well-settled that such power is an inherent one of the courts, to protect themselves and hence the public in the administration of justice. Such regulation, however, must not be arbitrary, capricious, or discriminatory, but must be reasonable and just, in conformity with the Fourteenth Amendment.

III.

Integration is a reasonable means of regulating the profession under the Fourteenth Amendment.

The State Bar is a public agency, established by the court to aid in its judicial functions and subject to its supervisory control. It quite obviously is not a political party, as appellant claims. He is not asked to belong to a private organization but a governmental body created for a public purpose.

Moreover, the integrated bar is a representative, democratic, and self-governing organization. It includes and represents all members of the bar, regardless of race, color, creed, or class. Other professions are regulated by state boards, and the members of the professions have little or nothing to say about the functioning of such boards and appointments to them. The State Bar, on the other hand, operates under a democratic process whereby the members elect their own officers and board of directors, can initiate direct action, and can participate in the work of the bar. The rights of minorities are fully protected, and arbitrary action can always be prevented by the court under its supervisory power.

The very fact that bar integration requires all members to belong and pay dues is a badge of its fairness. It is only reasonable that all should contribute toward the costs of policing and improving their profession, rather than to leave it to the volition of each lawyer, so that some will bear their share and others will escape. Such dues fall in the same category as annual license fees imposed upon other callings

which are subject to state regulation, and their validity has been sustained in many cases.

In addition, the integrated bar can render greater and more effective service than the voluntary bar because it has the financial resources to do so and because it stimulates broader interest and participation in its activities by the profession. Experience with integration in Wisconsin since 1957 has demonstrated increased services to the profession and the public.

Finally, integration fixes responsibility upon the whole profession and enables it to act with respect to the entire bar. Better results are obtained in dealing with common problems and enforcing the rules of professional conduct when there is an organization to which all belong who are affected thereby.

IV.

Appellant's First Amendment rights are not impaired because he is required to "belong" to the State Bar in order to practice law. His freedom as an attorney is not limited any more now than before integration. In order to practice, he had to be admitted to the bar and remain a member in good standing. He became an officer of the court and accepted the conditions and restraints which go with the prerogatives. They apply to him now as much as they did before the bar was integrated. The bar to which appellant was required to belong before integration is the same as the bar to which he now belongs, except that now it is fully organized and better able to function. Appellant is

not compelled by integration to associate with anyone. He is as free as he pleases to attend meetings of the bar, vote in its elections, or participate in bar activities. In addition, he has the full freedom to be heard and to express his views, in support or opposition to those of other members.

In any event, the issue of First Amendment rights in this case, and freedom of association in particular, was settled by *Railway Employes' Dept. v. Hanson*, 351 U. S. 225. The Court found that the record presented no infringement of such rights by a union shop agreement under the Railway Labor Act,—in fact, no more than in the case of the integrated bar. Regardless of the dictum about the integrated bar, the principle of *Hanson* is just as applicable to the all-inclusive bar as to the all-inclusive union. There was no need for the Court in *Hanson* to balance any competing interests or to find a compelling interest because there was no problem of First Amendment freedoms on the record and the only issue was one of lawful regulation of labor relations under the Commerce Clause. The only issue in the instant case is one of reasonable regulation, too, although there is a compelling interest in the state in integrating the bar in order to improve the profession and the administration of justice. This is a public objective as legitimate and important as maintaining industrial peace.

Appellant objects to the legislative activities of the State Bar as violating his freedom of speech, but the record discloses no infringement. These activities are limited by the rules and by-laws of the bar which the court promulgated. The court below examined and took judicial notice of all such activities since the bar was integrated and found that in each instance the measure advocated or opposed

dealt only with the administration of justice, court reform, or legal practice,—all within the restricted scope of the rules and by-laws. Such activities are technical, non-partisan, and non-political in character, and serve a public purpose. The State Bar supports no candidates and takes no position on legislation of an ideological nature. In addition, any member of the bar is free to express his views on legislative or other matters at any time. Other public agencies also take positions on legislative proposals, but no citizen can object and refuse to pay his taxes on that account.

Appellant has no constitutional right of silence in the sense that he can prevent the majority from speaking because he may disagree with its views and prefer not to express his disagreement. Such right claimed by the appellant would compel the group to remain silent in order that the minority need not dissent, which would turn the shield of the First Amendment into a sword. Minority rights are entitled to protection but not by destroying the rights of the majority.

V.

The validity of the integrated bar under the Federal Constitution has been upheld in every case in which the issue has been raised. There is a multitude of authorities in the state courts sustaining validity in general and compulsory membership and license fees in particular. Not a single case can be found which holds that integration violates the Federal Constitution.

ARGUMENT

I.

THE HISTORY AND DEVELOPMENT OF THE INTEGRATED BAR

An understanding of the Anglo-American development of the integrated bar is helpful, we believe, to a consideration of the constitutional issue involved in this case. The historical background gives an insight into the reasons and forces behind the integration movement.

A. *In England*

The integrated bar is an evolutionary outgrowth of the historic power to regulate the legal profession in order to maintain high standards and facilitate the administration of justice. As did so many of our legal concepts and institutions, it descended to us from our English ancestors.

Law as a profession in our Anglo-Saxon legal system goes back to medieval days. By the end of the Middle Ages the profession in England had developed into three categories, which have endured: (1) the judges and serjeants; (2) the apprentices (later known as barristers), organized in the four Inns of Court and the Inns of Chancery, and (3) the attorneys.[1]

The exact origin of the Inns is not known, and there are few records of them in the fourteenth century.[2] In ad-

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[1]Pound, The Lawer from Antiquity to Modern Times, 11, 82 (1953).

[2]2 Holdsworth's History of the English Law, 494-495 (1924); Barton, The Story of Our Inns of Court, 25-26 (1928).

dition to the four Inns of Court there were nine or ten lesser Inns of Chancery which were attached to the other Inns.[7] Dean Pound tells us that the Inns of Court go back almost to the beginning of the common law, and that "the English lawyers at the end of the Middle Ages had become a well developed, well organized profession, maintaining a system of societies or associations promoting a professional tradition, providing adequate training of those who were to enter the profession, and actively furthering the development of the law."[8]

In the ensuing years the Inns grew in importance and authority. Their main functions were to provide training or education for the profession and have charge of the admission and discipline of their members.[9] These same duties or activities are carried on today, except that now the actual technical education of the student is given by a university or by lecturers appointed by the Council of Legal Education, a body formed by the various Inns and their Bar Council.[10] As to barristers, the judges long ago delegated to the Inns their power of admitting persons to practice in the courts. If the Benchers of an Inn "called" a person to the bar, he was received and accepted as a practitioner by the courts. Likewise, the barrister was directly under the control of his Inn with respect to discipline. He could be disbarred by his Benchers or the judges, but the judges seldom acted.[11]

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[7] Pound, **op. cit., supra,** note 5, at 87-88.

[8] Ibid, 93.

[9] Ibid, 87-92.

[10] Bass, **The Organization of the Bar in England: A Sidelight on English Law,** 35 Am. Bar Ass. Jour. 995 (1949).

[11] Pound, **op. cit., supra,** note 5, at 99-100; Lund, **The Legal Profession in England and Wales,** 35 Jour. Am. Jud. Soc. 134, 135-136 (1952).

The strictness with which barristers have been regulated in England from early days was discussed at some length by Chief Judge Cardozo in *People ex rel. Karlin v. Culkin*, 248 N. Y. 465, 472-473, 162 N. E. 487, 490, where he said:

> ". . . He (the barrister) was called to the bar upon the nomination of the inns of court, whose members exercised that power as the delegates of the judges. . . . If a barrister was suspected of misconduct, the benchers of his inn might inquire of his behavior. We can hardly doubt that refusal to answer would have been followed by expulsion. There was thus little occasion for controversies as to discipline to be brought before the judges, unless the benchers failed in the performance of their duties. In case they did fail, a supervisory power was ever in reserve. The inns, being unincorporated associations, were not subject to mandamus. . . . They were subject, however, to visitation by the judges. . . . What the court could not do by the instrument of a writ, the judges did by orders in their capacity as visitors. They were not diffident or chary in announcing their pleasure or displeasure. Dugdale's Origines Juridiciales contains a record of the orders of the judges in the exercise of their control over members of the inns. The conduct of the barristers was regulated with minute particularity, even in matters so personal as the growth of their beards or the cut of their dress."

Today no person may be a member of the English bar, practicing as a barrister or advocate, without becoming a member of one of the four Inns. The Inns still decide who shall be admitted or called to the bar and maintain

tight disciplinary control over their members, including the right to suspend or even disbar them from practice.[12]

In addition to various fees as a student, the barrister must pay substantial fees and dues when called to the bar, which constitute a life-time payment. He remains a member of his Inn for life or during good behavior. If he is expelled from his Inn, he cannot gain admission to any of the others. Moreover, he is no longer given an audience in the courts.[13]

The solicitors or attorneys constitute the other branch of the profession in England. They had been excluded for some time from the Inns of Court, as to which Holdsworth says:

> "This exclusion of practising attorneys from the Inns of Court was not beneficial either to the attorneys or to their clients. It was not beneficial to the attorneys, because it deprived them of the benefit of a professional organization which could safeguard their interests. It was not beneficial to their clients, because the clients were deprived of the safeguard which the discipline of a professional organization gives. The attorneys were no doubt individually amenable to the discipline of the courts to which they were attached; but this was a much less effective form of discipline than that which an organized profession can apply. It was found to be difficult to apply the discipline of the courts to scattered individuals with no registered address."[14]

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[12]Lund. **op. cit., supra,** note 11, at 136.

[13]Burdick, Bench and Bar of Other Lands, 220-222 (1939).

[14]6 Holdsworth, **op. cit., supra,** note 6, at 442-443. The Wisconsin Court, in ordering integration of the bar in 1956, also gave as one of its reasons the need for maintaining a registry of all lawyers. **In re Integration of Bar,** 273 Wis. 281, 284-285, 77 N. W. 2d 602, 604.

As a result, the courts issued orders requiring all attorneys to become members of an Inn of Court or Chancery, but the Inns of Court refused to admit them and the Inns of Chancery were in a decadent state.[16] Left without a professional organization, the attorneys in the eighteenth century formed a "Society of Gentlemen Practisers in the Courts of Law and Equity," and in the following century The Law Society of today was established.[17]

The present Law Society is an organization of extensive authority and control over its branch of the profession. While membership in the Society is said to be "voluntary," parliament has given it powers and duties with respect to solicitors far beyond those of any integrated bar in this country. It regulates the examination, training, and admission of the solicitor, and it has full authority to strike him from the roll, suspend him from practice, and to fine him up to 500 pounds together with costs. Moreover, he may not practice unless he is issued a license by the Society each year, for which a small fee is paid. He is also compelled to contribute annually to the Society's "Compensation Fund," which is in the nature of a security fund for clients.[18]

Today no lawyer in England would have the temerity to challenge the authority of the Inns or The Law Society to regulate his professional life. "These restrictive rules are accepted cheerfully by the legal profession in England, because it is realized that in this way, and in this way

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[16] 6 Holdsworth, **op. cit., supra,** note 6, at 443. Orders to such effect were issued in 1633, 1654, 1667, 1684, and 1704.

[17] Ibid; 443; Wickser, **Bar Associations,** 15 Cornell Law Quar. 390, 392-393 (1930).

[18] Lund, **op. cit., supra,** note 11, at 139-141.

only, can the absolute integrity of the English Bar be upheld, and in this way only can the Bar be worthy of the high trust placed in it by the lay public in England."[14]

B. *In Canada*

It was natural, of course, that the idea of an integrated bar should spread to Canada from its mother country. In Canada, however, the distinction between barrister and solicitor is disappearing.

In 1797 the lawyers of Upper Canada (the present province of Ontario) were authorized by statute to form a Law Society. It was incorporated in 1822 and is the organization for all lawyers in the province, occupying approximately the same position as the Inns of Court in England. A similar organization now exists in every other Canadian province.[15]

Every lawyer is required to belong and pay annual dues in order to practice. The functions of the Society in each province include the supervision of legal education, the examination of those seeking admission to the bar, and suspension or disbarment, subject to court review. The Society is governed by a representative board, called Benchers, who are elected by the members.[16]

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[14]Bass, **op. cit., supra,** note 10, at 997.

[15]Winters, Bar Association Organization and Activities, 4-5 (1954); Adams, **The Self-Governing Bar,** 26 Am. Pol. Sci. Rev. 470, 470-471 (1932).

[16]Gordon, **The Organization of the Canadian Bar,** 4 Ore. L. Rev. 200, 200-201 (1925).

As will be seen, the progress made by the all-inclusive bar in Canada was so impressive that the idea of integration finally took root in the United States.

C. *In the United States*

Thus we find, as Dean William Wicker of the Tennessee College of Law points out, that "The English bar has been integrated for centuries and the bars in all of the provinces of Canada are integrated."[21] There was nothing new or radical about integration when the movement started in this country. It was a pillar of the English legal system, giving strength and character to the entire profession. When integration found acceptance in the United States, however, it was in a form with less power but more democracy than the organized bar of England.

The acceptance of the common law and the development of a legal profession were well begun in this country at the time of the Revolution, but a reaction set in after that. There were many reasons for this, including the post-revolutionary economic depression which gave rise to dissatisfaction with law and a dislike for lawyers, political conditions which created enmity toward England and its legal system, social conditions which brought a levelling process and a disbelief in professions in general, and geographical conditions which tended to decentralize the administration of justice and so of the bar.[22] Statutes frequently were enacted which threw the practice of law open to all. In some states, including New Hampshire, Maine,

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[21] Wicker, **Integrated Bars**, 21 Tenn. L. Rev. 708, 709 (1951).

[22] Pound, **op. cit., supra**, note 5, at 177-183.

Wisconsin, and Indiana, all educational requirements were abolished."[22]

With the coming of Jacksonian democracy, badges of social distinction were cast aside. Everyone was entitled to engage in any calling or profesesion, as a natural right or otherwise. The influence of the frontier was a decisive factor in such thinking because "A pioneer society does not believe in specialists nor in an organized profession of lawyers. The pioneer feels himself equal to anything and prefers to believe that he can prosecute, defend, and judge his own law suits."[24]

Pound speaks of the period from 1836 to 1870 as the "era of decadence" of the legal profession. "The high point at the beginning," he says, "is on the eve of the Revolution. The lowest point is immediately after the Civil War. The rise begins with the present-day type of bar association in 1870 or certainly in 1878, and the high point has been regaining since 1921 and is attained once more in the integrated bar in half of the states."[25]

In 1914 Herbert Harley, founder and secretary of the American Judicature Society, visited Toronto in the Canadian province of Ontario, and was so impressed with the organization of the bar that he determined to promote integration in the United States.[26] In an historic address at

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[22]Wickser, **op. cit., supra,** note 16, at 392; Pound, **op. cit., supra,** note 5, at 229-231.

[24]Pound, Speech at Brooklyn Law School, Nov. 10, 1928.

[25]Pound, **op. cit., supra,** note 5, at 223.

[26]Winters, **Integration of the Bar—You Can't Lose,** 39 Jour. Am. Jud. Soc. 140, 141 (1956).

Lincoln, Nebraska that same year he urged an all-inclusive bar as a means to reform and improve the profession.[27]

The idea caught fire and was discussed and debated at many bar association meetings. In 1918 the American Judicature Society published a proposed integrated bar act with extensive powers over admission, discipline, and disbarment.[28] The next year the Conference of Bar Association Delegates of the American Bar Association appointed a committee on state bar organization, headed by Judge Clarence N. Goodwin. It submitted a report to the Conference in 1920 in St. Louis in which it recommended the creation of state integrated bars. It found that the voluntary associations had done some fine work but were inadequate for the task of elevating the profession. It pointed out that members of the supreme court bar of a state have definite legal status as a part of the machinery of state government and constitute a body politic; that they are the advising and moving officers of the court, just as the members of the bench are its deciding and decreeing officers; that a lawyer's responsibilities before the court are similar to those of a government official and not of a private citizen; and hence that the entire bar of a state should be organized and should function in legal recognition of the fact that it is a body politic and an integral part of the judicial department.[29] It said:

> ". . . No legal difficulty in the way of such an organization has occurred to the committee, and it believes that no practical legal difficulty exists.

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[27]Harley, **A Lawyer's Trust**, 7 Neb. State Bar Ass. Proc. 143, reprinted in 29 Jour. Am. Jud. Soc. 50 (1945).

[28]2 Jour. Am. Jud. Soc. 111 (1918).

[29]4 Jour. Am. Jud. Soc. 83 (1920).

"We call attention of the conference to the fact that this is the only civilized nation in the world in which the judicial bar is not a self-governing, responsible body politic, and it is likewise the only civilized nation in which the title of a lawyer does not carry with it a guarantee of professional integrity and responsibility."[20]

Speaking from his own experience, Judge Goodwin of Chicago said:

"How has the bar been governed in the past? It is said that it has been governed by courts, but this is true only in a most restricted sense. It has been my privilege to sit upon the bench both in the trial and appellate courts and I know how impossible it is for those in that isolated position to exert any practical control over the actions of the thousands who constitute the bar. Naturally the only effective action courts are able to take is upon information submitted to them, usually by the voluntary bar associations, and if we are frank with ourselves, we must admit that such efforts at bar government have been in the greater part a failure."[21]

The movement for the integrated bar in the 1920's was supported by such leading figures of the legal world as Charles Evans Hughes, Elihu Root, John W. Davis, Dean Wigmore,[22] Arthur T. Vanderbilt,[23] Robert H. Jackson,[24] and

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[20]Ibid. 85.

[21]Address to New York State Bar Association. Jan. 20, 1922; reprinted in 5 Jour. Am. Jud. Soc. 181, 183 (1922).

[22]Cohen, **The National Call for the Organization of An All Inclusive Bar,** 4 N. Y. L. Rev. 80, 82, 83 and continued at 135, 136 (1926).

[23]Vanderbilt, **What Is Bar Integration,** 60 N. J. L. Jour. 397 (1937).

[24]Jackson, **Compulsory Incorporation of the Bar from the Country Lawyer's Viewpoint,** 4 N. Y. L. Rev., 316 (1926).

others. Hughes took an active role in the debate over integration in New York as provided in the Gibbs Bill, which was finally defeated. At a meeting of the New York State Bar Association in 1926 he supported the proposal vigorously, saying:

> ". . . I should like to see the entire bar brought within the influence of the men who are now laboring under difficulties in the organizations to which the great number of our bar feel they are entirely unrelated. They are on the outside, and we need in this day of great numbers the most effective organization that we can get. Anybody who is admitted to the bar receives a privilege on condition. I have no doubt that one of those conditions can be that he shall become a responsible member of an organization of this sort. The state can certainly, it seems to me, impose that condition upon his being admitted to the privileges of practice. Bring him into this range of conscious responsibility. Have him understand that he is not simply amenable to discipline by some organization to which he has no relation, but that he is a part of the bar maintaining these standards which control his conduct."[34]

One of the objections to the proposal in New York stemmed from the fear that an all-inclusive bar would permit the influx of undesirable elements, particularly from the large masses of immigrants in New York City.[35] Similar opposition was voiced in the South with respect to Negro lawyers.[36] In answer to the fear expressed in

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[34]See Goodwin, **Elihu Root and Charles Evans Hughes Were Early Leaders of the Movement for Integration of the Bar,** 34 Jour. Am. Jud. Soc. 149, 150 (1951).

[35]Wickser, **op. cit., supra,** note 16, at 405-407; Guthrie, **The Proposed Compulsory Incorporation of the Bar,** 4 N. Y. L. Rev. 223, 232-233 (1926).

[36]See Wicker, **The Pros and Cons of An Integrated Bar,** 23 Tenn. L. Rev. 457, 459 (1954).

New York, Hughes said, "Instead of that being a reason to be urged in opposition to this plan of the organization of the entire bar, it seems to me to be a fundamental ground for urging that organization."[32]

Robert H. Jackson had deep convictions on the issue which he expressed at a bar meeting at Buffalo, New York, in 1926. He decried the ineffectiveness of the voluntary bar associations and attacked the Gibbs Bill as too impotent, ridiculing the $3.00 membership dues as absurdly low. "I would favor a movement in the direction of the British system—without, however, entertaining any wish that the evolution in that direction be unduly forced or any delusion that even an approximation of their excellent system can, under American conditions, be accomplished," he said.[33] For the present he urged awaiting the development of sentiment among the bar and public "that will sustain the creation of a real bar association, all inclusive in membership, self-governing in character, with substantial power to exercise and duties to perform and functioning upon a system that will represent every element of our ancient and well-loved profession."[34]

While New York argued and debated, other states were not so hesitant about experimenting with this new idea. In 1921 North Dakota became the first state to have an integrated bar. Two years later statutes were passed creating such a bar in Idaho and Alabama. Today there are

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[32] Guthrie, **op. cit., supra,** note 36, at 233.

[33] Jackson, **op. cit., supra,** note 34, at 316.

[34] Ibid, 320-321.

organized bars in 27 states,[41] Puerto Rico and the Virgin Islands. Integration in these states has been accomplished by (1) legislative action in the form of detailed statutes, or (2) legislative action authorizing the state supreme court to integrate the bar, or (3) promulgation of rules by the state supreme court by virtue of its inherent judicial power to regulate the profession. Wisconsin is in the third category, together with Florida, Missouri, Nebraska, Oklahoma, and the Virgin Islands. The Virgin Islands has the only bar integrated by a federal court.

Wisconsin is the most recent state to integrate its bar, but other states are considering it, and this year the integration issue was revived in New York by Chief Judge Charles S. Desmond of the Court of Appeals.[42]

No state having an integrated bar has reverted to a voluntary form of organization.[43] Time and experience are the tests of most undertakings. The success of the integrated bar where tried is attested by the comments of those in the best position to know—the supreme court judges of integrated states.[44]

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[41] Alabama (1923), Alaska (1955), Arizona (1933), Arkansas (1938), California (1927), Florida (1949), Idaho (1923), Kentucky (1934), Louisiana (1940), Michigan (1935), Mississippi (1930), Missouri (1944), Nebraska (1937), Nevada (1929), New Mexico (1925), North Carolina (1933), North Dakota (1921), Oklahoma (1939), Oregon (1935), South Dakota (1931), Texas (1939), Utah (1931), Virginia (1938), Washington (1933), West Virginia (1945), Wisconsin (1957), Wyoming (1939). Arkansas has an integrated bar for disciplinary purposes only.

[42] Glaser, Bibliography on the Integrated Bar, 10 (1960), prepared by the Bureau of Applied Research of Columbia University, citing speeches by Judge Desmond.

[43] The Oklahoma legislature in 1939 repealed the State Bar Act. However, within a few months the Oklahoma Supreme Court integrated the bar under its inherent power.

[44] **Supreme Court Justices Present Views on bar Integration,** 25 Jour. Am. Jud. Soc. 91, 126, 159 (1941-42), setting forth letters from judges of states having integrated bars.

When the Florida bar was integrated in 1949, the court remarked that "Letters received from the States in which the integrated bar has been tested, recommend it as a vast improvement over the voluntary organization and proclaim that they would under no circumstances return to the old system." *Petition of Florida State Bar Assoc.*, 40 S. 2d 902, 904. Dean Pound puts it somewhat differently when he asserts that integration in all the states is the ultimate stage in reprofessionalizing the bar." "Organization of the profession as such was the way out at the end of the colonial era and at the end of the frontier era," he says. "I submit that completion and perfection of professional organization is what may save us from another era of decadence and resulting injury to law and to constitutional democracy."[10]

II.

THE PRACTICE OF LAW IS A PRIVILEGE SUBJECT TO REGULATION IN FURTHERANCE OF THE ADMINISTRATION OF JUSTICE AND NOT A CALLING IN WHICH EVERYONE HAS A VESTED RIGHT TO ENGAGE.

A. *The Practice of Law is a Privilege Burdened with Conditions because it is an Integral Part of the Administration of Justice*

Underlying appellant's argument is the proposition that the practice of law is like any other activity or calling, insofar as constitutional rights are concerned.[11] Accord-

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[9] Pound, **op. cit., supra,** note 5, at 8, 349, and 362.

[10] Ibid. XXVIII of Preface.

[11] Appellant's Brief, 45-49.

ingly, he asserts "there is no reason for saying that attorneys have less constitutional rights of freedom than those persons in other professions and callings.""

This is a high-sounding statement, but it ignores the role and public responsibility of the lawyer in the administration of justice. The practice of law is different from other professions and pursuits because of its unique relationship to one of the primary departments of government. As one writer said, "The regulation of the Bar and the practice of law is unlike the regulation of barbers or physicians for the reason that the courts and the general administration of justice are so inextricably affected.""

It is not that lawyers are in a special class above other callings, trades, or occupations. Rather it is that they are subjected to special regulation because of their day-to-day part in the functioning of the judicial system. Such regulation may place restraints upon the freedom of the lawyer, compared to the freedom of those in business or other callings, but it is intended to serve the people and insure their rights under our constitutional form of government.

As was said so well in *Schware v. Board of Bar Examiners*, 353 U. S. 232, 247 (concurring opinion):

> "Certainly since the time of Edward I, through all the vicissitudes of seven centuries of Anglo-American history, the legal profession has played a role all its own. The bar has not enjoyed prerogatives; it has been entrusted with anxious responsibilities. One does not have to inhale the self-adulatory bombast of after-

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"Ibid, 50.

"Bennett, Non-Lawyers and the Practice of Law Before State and Federal Agencies, 46 Am. Bar Ass'n. Jour. 705, 706 (1960).

dinner speeches to affirm that all the interests of man that are comprised under the constitutional guarantees given to 'life, liberty and property' are in the professional keeping of lawyers. It is a fair characterization of the lawyer's responsibility in our society that he stands 'as a shield,' to quote Devlin, J., in defense of right and to ward off wrong. From a profession charged with such responsibilities there must be exacted those qualities of truth-speaking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility, that have, throughout the centuries, been compendiously described as 'moral character.' "

Accordingly, the courts have held that there is no natural or constitutional right to practice but that a privilege is granted conditioned upon compliance with certain qualifications, standards, and regulations. One of the most frequently cited cases on this point is *People ex rel. Karlin v. Culkin*, 248 N. Y. 465, 470-471, 162 N. E. 487, 489, in which the court said:

" 'Membership in the bar is a privilege burdened with conditions.' Matter of Rouss, supra, 221 N. Y. page 84, 116 N. E. 783. The appellant was received into that ancient fellowship for something more than private gain. He became an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice."

The same thought is expressed in the case of *In re Greer*, 52 Ariz. 385, 389, 81 P. 2d 96, 98, in the following language:

". . . The right to practice law is not a natural nor constitutional one, in the sense that the right to engage

in the ordinary avocations of life, such as farming, the industrial trades and the mercantile business is. It has always been considered as a privilege only, bestowed upon certain persons primarily for the benefit of society, and upon such terms and conditions as the state may fix. The final determination as to what these conditions are, and who has satisfactorily complied therewith, is, and always has been, in the courts before which the individual practices his profession, and from time immemorial such individuals have been considered essentially and primarily as officers of the court admitting them."

Similarly, the court said in *Petition for Integration of Bar of Minn.*, 216 Minn. 195, 200, 12 N. W. 2d 515, 518:

". . . The practice of law is not a property right guaranteed or protected by either the state or federal constitution. It is a privilege conferred on the individual by the court to further the administration of justice. Lawyers will agree that the administration of justice, the protection of the public, and the safeguarding of the rights guaranteed by the constitution outweigh the court's obligation to maintain the privilege accorded the individual lawyer in admitting him to the practice of law."

This Court stated the proposition succinctly in *In re Isserman*, 345 U. S. 286, 289, when it said, "There is no vested right in an individual to practice law. Rather there is a right in the Court to protect itself, and hence society, as an instrument of justice"; and again in *Theard v. United States*, 354 U. S. 278, 281, when it declared, "The court's control over a lawyer's professional life derives from his relation to the responsibilities of a court."

This Court has also held that the "right" to practice law is not a privilege or immunity of a citizen protected by the United States Constitution, either under Article IV or under the Fourteenth Amendment, but the question whether women shall be admitted to practice is for the determination of state courts. *Bradwell v. The State*, 16 Wall. 130, 137-139; *In re Lockwood*, 154 U. S. 116, 117-118. One of the reasons for refusing admission in the *Bradwell* case was that the applicant, being a married woman, could not enter into binding contracts. In the *Lockwood* case the Court merely said it was up to the state court to construe the Virginia statute and to determine whether the word "person" as used therein was confined to males.

Other cases of interest holding that the practice of law is a privilege burdened with conditions and not a natural, vested, or constitutional right, are *In re Gibbs*, 35 Ariz. 346, 353, 278 P. 371, 374; *State Bar Ass'n. v. Conn. Bank & Trust Co.*, 145 Conn. 222, 234, 140 A. 2d 863, 870; *In re Cox*, 164 Kan. 160, 167, 188 P. 2d 652, 657; *Matter of Co-operative Law Co.*, 198 N. Y. 479, 483, 92 N. E. 15, 16; *In re Thatcher*, 190 Fed. 969, 974-975 (N. D. Ohio). In the last case cited the court called it "an extraordinary privilege" granted on certain conditions and described the lawyer's role in the judicial process as follows:

> "By approved practice and ex necessitate an attorney at law is clothed in some measure with the court's power. For instance, his engagement in a case gives him the right to command the court's processes of summons and subpoena, and the court's officers are at his call to execute his will in behalf of his client for many purposes. His retainer gives him the ear of the court, and also affords him the court's protection against a

refractory client. He is the only proper vehicle of communication between the court and his client, and upon him the court must rely for the performance of many intimate and responsible duties. These and other considerations suggest that to call him an officer of the court is by no means a figure of speech." (974-975)

Thus, it is well settled that no one has a vested right to practice. It is a privilege subject to regulation to facilitate the administration of justice, which is clearly a legitimate objective of government.

B. *Regulation of the Practice Rests with the Courts under their Inherent Supervisory Power over the Bar, subject only to the Provisions of the Fourteenth Amendment*

Legislatures have acted in the field of bar regulation, but the courts have countenanced such action only as imposing minimum qualifications to protect the public interest and to aid the judiciary. The final and ultimate repository of power to regulate the legal profession rests with the courts. *In re Opinion of the Justices,* 279 Mass. 607, 609, 180 N. E. 725, 727; *In re Cannon,* 206 Wis. 374, 396, 240 N. W. 441, 450.

In *People ex rel. Karlin v. Culkin,* 248 N. Y. 465, 162 N. E. 487, the question was whether the court had the power to direct a general investigation into "ambulance chasing" in New York on the petition of three bar associations and in the course of that inquiry to compel an attorney to testify as to his professional conduct. Chief Judge Cardozo had no doubt about the court's power. He studiously traced it from "the history of the profession in its

home across the seas," and concluded that it was an inherent or implied power, regardless of constitutional or statutory authority. He said:

> "With this background of precedent there is little room for doubt as to the scope and effect of the provision in the Constitution of 1777 that attorneys might be regulated by rules and orders of the courts. The provision was declaratory of a jurisdiction that would have been implied, if not expressed. . . .
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> ". . . In the long run the power now conceded will make for the health and honor of the profession and for the protection of the public. If the house is to be cleaned, it is for those who occupy and govern it, rather than for strangers, to do the noisome work." 248 N. Y. 465, 477-480, 162 N. E. 487, 492-493.

This same principle of inherent judicial power over the profession has long been recognized in connection with bar integration. When the Nebraska bar was integrated by judicial order, the court in a scholarly opinion discussed at length its inherent power over the practice of law. *In re Integration of Nebraska State Bar Ass'n.*, 133 Neb. 283, 286-289, 275 N. W. 265, 266-268. Good discussions of the subject are also to be found in *Petition of Florida State Bar Ass'n.*, 40 S. 2d 902, 905-906; *Petition for Integration of Bar of Minn.*, 216 Minn. 195, 199, 12 N. W. 2d 515, 517-518; *In re Integration of State Bar of Oklahoma,* 185 Okla. 505, 506-507, 95 P. 2d 113, 114-116; *Integration of Bar Case,* 244 Wis. 8, 36-54, 11 N. W. 2d 604, 617-625.

The regulatory power of the courts, however, may not be exercised in an arbitrary, discriminatory, or capricious manner. The conditions imposed must be within the bounds of due process and the equal protection of the laws under

the Fourteenth Amendment. Regulation must be reasonable and have a rational relation to the end to be attained. *Ex Parte Secombe,* 19 How. 9, 13; *Schware v. Board of Bar Examiners,* 353 U. S. 232, 239, and concurring opinion at 248-249. See, also, *Dent v. West Virginia,* 129 U. S. 114, 122, 124; *Graves v. Minnesota,* 272 U. S. 425, 428.

Discussing the power of the courts over the bar and the limits of that power, Chief Justice Taney, in *Ex Parte Secombe, supra,* said (13):

> ". . . And it has been well settled, by the rules and practice of common-law courts, that it rests exclusively with the court to determine who is qualified to become one of its officers, as an attorney and counsellor, and for what cause he ought to be removed. The power, however, is not an arbitrary and despotic one, to be exercised at the pleasure of the court, or from passion, prejudice, or personal hostility; but it is the duty of the court to exercise and regulate it by a sound and just judicial discretion, whereby the rights and independence of the bar may be as scrupulously guarded and maintained by the court, as the rights and dignity of the court itself."

III.

INTEGRATION IS A REASONABLE MEANS OF REGULATING THE LEGAL PROFESSION AND PROTECTING THE PUBLIC INTEREST IN THE ADMINISTRATION OF JUSTICE UNDER THE FOURTEENTH AMENDMENT

A. *The State Bar is not a Private Organization but a Public Agency subject to Supervision by the State Supreme Court*

"Integrated bar associations are political associations—political parties," says the appellant. "Not only is the association a political party but it is a party organized along the lines of class."[50]

He offers no facts, admits that the State Bar does not support candidates for judicial or other office, and simply asserts, "It has certain aims and principles and a certain line of public policy which it desires and seeks to have carried out by the government."[51] So do most public agencies and many other organizations—charitable, educational, and otherwise.

It is apparent that appellant misconceives the true nature of the State Bar. The court below held that it is a *public* and not a *private* agency (R. 75). This is in accord with prior expressions of other courts concerning the character of the integrated bar. *State Bar v. Superior Court*, 207 Cal. 323, 328-329, 278 P. 432, 434; *In re Gibson*, 35 N. Mex. 550, 570-571, 4 P. 2d 643, 653. It is an arm or agency of the court established to promote the administration of

[50] Appellant's Brief, 58, 60.

[51] Ibid, 60.

justice. It has been said by the author of an annotation on integrated bars in 114 A. L. R. 161, at 161, that regardless of whether such bars are created by statutes or court rules, they "have the common characteristics of being organized by the state or under the direction of the state, and of being under its direct control, and in effect they are governmental bodies."

The most recent case on this point is *State Bar of Michigan v. City of Lansing*, 105 N. W. 2d 131, decided September 16, 1960. This was a proceeding to determine whether the property of the State Bar was exempt from taxation. The Supreme Court affirmed the trial court's finding that such property is "public property belonging to the State of Michigan and as such is exempt from taxation" (137). It held that the bar was not a private organization but a governmental agency created for the specific public purpose of performing functions pertaining to the judiciary (135).

The public and governmental character of the State Bar of Wisconsin is demonstrated by the enumeration of purposes in Rule 1, § 2, of the State Bar rules, all "to the end that the public responsibilities of the legal profession may be more effectively discharged." Its general public purpose was also proclaimed by the legislature in § 256.31 (2), Wis. Stats., which declared that the Supreme Court should provide for the organization and government of the State Bar "to the end that such association shall promote the public interest by maintaining high standards of conduct in the legal profession and by aiding in the efficient administration of justice."

Thus, appellant is not asked to join a private association—and certainly not a political party—but a governmental body created for a public purpose and subject to the supervision of the court.

B. *Integration Provides a Democratic, Self-Governing form of Regulation for the Bar*

The integrated bar is a representative and democratic organization of the profession as a whole, with full opportunity for self-government. It is more democratic than the old voluntary type of association because it includes and represents all members of the bar. Unlike some voluntary associations, no one is excluded from the integrated bar by reason of race, color, creed, or class.

In fact, the lawyer in the State Bar of Wisconsin enjoys far more freedom and democracy than any other licensee in that state. Other professions are regulated by examining boards such as the boards of medical examiners, dental examiners, pharmacy examiners, etc. In all instances the members of the profession have little or nothing to say about the functioning of such boards or appointments to them, which are made by the Governor. The integrated bar, on the other hand, operates under a democratic process whereby the members of the bar elect their own officers and board of governors, can initiate direct action in the assembly or by petition, and have the opportunity to participate in the work of the sections and committees. When it ordered integration made permanent, the Wisconsin court said:

> "These rules and by-laws constitute a democratic process by which members of the bar can govern themselves and can act in unison and by which minorities are protected; and they provide appropriate procedures for invoking the supervisory power of this court." *In re Integration of the Bar*, 5 Wis. 2d 618, 627, 93 N. W. 2d 601, 605.

Although given the freedom and authority of self-government, the integrated bar cannot abuse its power because it is always subject to the supervisory control of the court. If it should engage in activities or embark on policies outside its proper scope, the court has made it clear it can and will take remedial action. *In re Integration of the Bar*, 5 Wis. 2d 618, 624-625, 93 N. W. 2d 601, 604.

The board of governors of the State Bar is an elected, representative policy-making body. When it decides a matter within its province,

> ". . . everyone understands or should understand the policy is that of the State Bar as an entity separate and distinct from each individual. Such pronouncement of the State Bar does not necessarily mean all of its members agree with that pronouncement, nor is it necessary for them to do so. Individual members are free to think and to express their own opinions. But it is in the nature of a representative democratic organization that the elected representatives of the group speak and act for it in accordance with its organic laws." *In re Integration of the Bar*, 5 Wis. 2d 618, 623, 93 N. W. 2d 601, 603.

C. *Bar Integration is Fair and Equitable because it Requires All Members to Pay their Just Share, in the form of Annual Dues, for the Purpose of Regulating and Improving the Profession*

An annual fee from each lawyer simply means that each is required to pay his fair share of the costs of policing and improving his profession. There are no "free riders" in the integrated bar. It is only reasonable and right that all should contribute for this purpose, rather than to leave it to the personal volition of each lawyer, so that some will bear their share and others will escape.

This principle is not new, of course. We all know that annual license fees are required of other professions, trades, and occupations which are subject to regulation. In Wisconsin such fees are imposed annually on architects, chiropractors, barbers, plumbers, well drillers, funeral directors, doctors, dentists, engineers, real estate brokers, optometrists, and others. The fees range from $3.00 in the case of veterinarians[32] to $25.00 for master plumbers[33] and optometrists.[34] Chiropractors,[35] real estate brokers,[36] and well drillers[37] each pay $15.00 per year.

The annual dues of the integrated bar are well within the above range. Active members are called upon to pay $15.00 a year, except that a newly admitted lawyer is re-

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[32] Wis. Stats., sec. 95.53.

[33] Ibid. sec. 145.08 (1) (b).

[34] Ibid. sec. 153.06 (1).

[35] Ibid. sec. 147.23 (7).

[36] Ibid. sec. 136.06 (3) (b).

[37] Ibid. sec. 162.04 (1).

quired to pay only $8.00 annually, and inactive members pay $5.00 per year (R. 28).

The court below held that the dues requirement of lawyers under integration falls in the same category as annual license fees imposed upon any other occupation or profession which is subject to state regulation, citing various cases (R. 71). Other cases sustaining the validity of integrated bar dues are annotated in 114 A. L. R. 161, 165-168, and 151 A. L. R. 617, 619-621.

When the integrated bar of Florida petitioned in 1952 to increase its annual dues, which amounted to only $5.00, objection was raised as to the validity of such dues. The court summed up the whole issue as follows:

> "One of the primary objectives of the Integrated Bar was to bring every attorney into the organization in order that he might have a part in and bear his share of the burden of giving these and other services to the bar and the people. To contend that such services should be supported by voluntary contributions is equivalent to contending that those who do not choose to contribute have no responsibility to the bar or the public—to say, in other words, that the law profession is nothing more than a trade to make a living. There certainly should be no objection on the part of any lawyer who is sensitive to the duty his profession is charged with, to meet his share of the burden. . . . The services rendered by the Integrated Bar of Florida are not unlike those being rendered by the Integrated Bar in other States; they are advocated and supported by the best professional thought in the country and are considered essential to the well being of the profession." *In re Florida Bar*, 62 S. 2d 20, 23.

One of the reasons given by the Wisconsin Supreme Court when it ordered integration in 1956 was that the voluntary association had become static and a substantial minority of the lawyers did not belong and support it. *In re Integration of the Bar*, 273 Wis. 281, 283, 77 N. W. 2d 602, 603. Appellant maintains this is not a sufficient or overriding reason to justify integration." However, the fact that a substantial minority (20 to 25 per cent) of non-union members did not join and contribute to the support of labor unions but enjoyed the benefits of collective bargaining by the unions, was considered by this Court a legitimate reason for the enactment of § 2, Eleventh of the Railway Labor Act to permit all-union shop agreements. *Railway Employes' Dept. v. Hanson*, 351 U. S. 225, 231.

D. *The Integrated Bar is Able to Render Greater and More Effective Service to the Public and the Profession than the Voluntary Bar*

With limited resources, interest, and participation, the old voluntary bar could not hope to undertake the work and achieve the goals of the integrated bar. The receipt of annual dues from all lawyers makes it possible for the integrated bar to render greater service to the profession and the public.

This has already been demonstrated in the short experience with integration in Wisconsin. After a trial period of two years, the Wisconsin Supreme Court found:

"Under integration the State Bar has increased its services to lawyers in this state, promoted the high

"Appellant's Brief, 51-52.

standards of the members of the profession, and increased its contribution to public service and to the administration of law and justice." *In re Integration of the Bar*, 5 Wis. 2d 618, 621; 93 N. W. 2d 601, 602.

In an appendix to its opinion the court below gave an analysis of some major activities of the State Bar, based upon facts of which it took judicial notice (R. 76, 77-81). The court dwelt upon the public purpose served by the various activities of the integrated bar, but made special note of increased services as a result of integration in the fields of unauthorized practice (R. 79) and the investigation and handling of grievance complaints (R. 81). Other integrated bar states have had similar results of greater work and more effective service."

Appellant states in his complaint (R. 4) that integration has doubled the income from bar dues—from $45,000.00 in 1956 under the voluntary organization to approximately $90,000.00 under the State Bar. Such added resources naturally and obviously enable the State Bar to do more work and render more service, not only in the fields of unauthorized practice and professional misconduct, but in many other areas in which it is active, such as the programs for continuing education of the profession, the improvement of practice and procedure, court reorganization, legal aid and other public services, to mention a few.

In addition to providing greater service because of added income, the integrated bar stimulates broader inter-

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"Wicker, **The Pros and Cons of An Integrated Bar**, 23 Tenn. L. Rev. 457, 458 (1954). See, also, **Supreme Court Justices Present Views on Bar Integration**, 25 Jour. Am. Jud. Soc. 91, 126, 159 (1941-42).

est and participation in its activities by the profession."[10] This prompted President-elect Howard L. Barkdull of the American Bar Association, a voluntary association, to say that "The influence and accomplishments of the legal profession in the states which have adopted the integrated form of organization are sufficient to make clear that this is one of the most effective ways of strengthening state bar activities. The spread of the integration movement has been accompanied by increased record of performance on the part of the profession in these states, and the extension of integration among the twenty-three voluntary states will probably do more to increase the strength of the organized bar in those jurisdictions than can be accomplished by any other single factor.""[11]

E. *The Integrated Bar Fixes Responsibility upon the Whole Profession and Gives it a Better Opportunity to Discharge its Duties in the Administration of Justice*

Finally, integration makes the whole profession a cohesive, functioning unit with responsibility for its public duties more firmly fixed. The integrated bar has been defined as "the process by which every member of the bar is given an opportunity to do his share in carrying out the public service of the bar, and obliged to bear his portion of the responsibility." 114 A. L. R. 161, at 161.

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[10]Winters, **Integration of the Bar—You Can't Lose,** 39 Jour. Am. Jud. Soc. 140, 144 (1956).

[11]Barkdull, **Methods of Strengthening Bar Associations,** 35 Jour. Am. Jud. Soc. 9, 14 (1951), a report to the Survey of the Legal Profession.

The history of the bar in England and America demonstrates, as pointed out in Part I of our Argument, that if discipline and high standards are to be maintained, and the profession cleansed of the unfit, these things can best be done by the profession itself. Certainly the courts from their isolated position cannot exercise effective surveillance and control of the bar themselves. That can only be accomplished with the cooperation and assistance of the bar—not just part of it in the form of voluntary associations—but by the profession as a whole organized with authority commensurate with its public responsibilities.

Referring to the high standards of the integrated bars of England and France, Professor Edson R. Sunderland says, "All political experience indicates that it is futile to expect services of a public nature to be satisfactorily performed otherwise than by vesting adequate power in those chargeable with the character of the results. The movement for an integrated, self-governing bar is in accord with that experience."[11]

It is important to recognize, too, that the profession has problems and obligations as a whole which are quite different from those of the voluntary association. They cannot be dealt with by individuals or groups, sometimes active and more often inactive, usually without adequate funds, and always speaking only for themselves or a part of the profession.

The public looks upon the profession as a unit, and the conduct of a lawyer reflects credit or discredit on the bar

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[11]Sunderland, **A Unified and Self-Governing Bar**, 11 Tenn. L. Rev. 236, 246 (1933).

regardless of bar association membership. An all-inclusive bar representing and having supervision of the whole profession has more standing and authority to protect itself and the public against transgressing members. The ethics of the profession can be maintained and unprofessional conduct controlled more effectively as to members of a bar organization than as to non-members. Enforcement of the rules is easier when there is an organization to which all belong who are subject to such rules.

A whole bar can do more than half a one. There is no such thing as half a lawyer. Once having made the voluntary choice to enter the legal profession and to become an officer of the court, the lawyer must accept the burden of bearing his portion of the responsibility along with the privileges and emoluments. In other words, he assumes his position as officer of the court *cum onere*. The rules of the court may reasonably require, we submit, that if he wants to get into the game he must join the team.

These are some of the factors the Wisconsin Supreme Court had in mind when it ordered integration in 1956 and ordered it continued in 1958. In its 1958 decision the court put it this way:

> ". . . All members had the same opportunity and have freely chosen a profession subject traditionally to discipline and control by the courts. It is not undemocratic to require those who are privileged to practice law and are entrusted with the duty to secure or protect the property, rights and liberties of others to become bound together in a united effort to increase their own capabilities, to maintain the high standards of the group and to increase the effectiveness of their service to the public. . . . Most objections have cen-

tered around the obligation to bear a portion of the responsibility. In the nature of things, every privilege has a correlative obligation." *In re Integration of the Bar*, 5 Wis. 2d 618, 622-623, 93 N. W. 601, 603.

* * *

Thus, we believe it is clear that integration is a reasonable means of regulating the profession. It is not in any sense arbitrary, capricious, or discriminatory but fair and just to all concerned, and is well within the limits of regulation under the due-process and equal-protection clauses of the Fourteenth Amendment. *Dent v. West Virginia*, 129 U. S. 114, 122-124; *House v. Mayes*, 219 U. S. 270, 282, 284; *Douglas v. Noble*, 261 U. S. 165, 168-170; *Graves v. Minnesota*, 272 U. S. 425, 428; *Semler v. Dental Examiners*, 294 U. S. 608, 610-612.

IV.

THE INTEGRATED BAR DOES NOT VIOLATE THE CONSTITUTIONAL GUARANTEE OF FREEDOM OF ASSOCIATION OR FREEDOM OF SPEECH UNDER THE FOURTEENTH AMENDMENT

We have touched upon the history of integration—how and why it developed—and the public aspects of the practice of law because it is so inextricably bound up with the administration of justice. The interest of society in this calling is so fundamental that there never has been any doubt that it is subject to regulation under the police power or the inherent supervisory power of the courts. We have attempted to show that bar integration is a legitimate or

valid exercise of that regulatory power, in that the rules promulgated by the Wisconsin Supreme Court are a reasonable form of regulation and are not arbitrary or discriminatory.

However, appellant maintains that integration goes beyond the legal limits of regulation to which the profession is subject, and in so doing invades his First Amendment freedoms. His contentions are: (1) that as a general proposition his freedom of association is violated by being compelled to be a member of the integrated bar; and (2) that his freedom of speech is violated if the State Bar expresses views with which he does not agree, particularly on legislative proposals. However, the record is devoid of any specific showing of actual interference with his right of speech, even as to legislative matters. Thus, with respect to freedom of speech, his objection is also a general one, i.e., that the S Bar may take positions on legislative or other ques contrary to his beliefs.

Accordingly, we address ourselves to these two general contentions of infringement of association and speech.

A. *Appellant's Freedom as a Member of the Bar is not Limited any more after Integration than before Integration*

Appellant quotes many worthy precepts with which no one would disagree, but he does not indicate anywhere in what particulars his freedom as a lawyer is limited any more now than before integration. The weakness of his position lies in the fallacy of his major premise, namely,

the assumption that his liberty has in actual fact been invaded.

Nowhere in his brief does he contend that annual fees or dues cannot be required of attorneys for regulation of the profession. He cannot, we are sure, seriously question the validity of imposing such fees in view of the well-established authorities for requiring them of other professions, occupations, or trade which are subject to regulation."

The essence of his position, therefore, is that his constitutional rights are curtailed because he is compelled to "belong" to the State Bar.

But in order to practice he was required to be a member of the bar before integration. Every practitioner must be admitted to the bar and remain a member in good standing, whether the bar is integrated or not.

When appellant made his own free choice to enter the profession, he accepted the conditions and restraints that go with the prerogatives. Like every other lawyer, he became an officer of the court, subject to its rules, discipline, and control. As such, his freedom has been restricted in various ways. He cannot, for example, exercise the right which others have to advertise and solicit business. His mouth is sealed as to confidential communications from clients. He must defend the indigent prisoner when designated by the court. He must give unswerving loyalty to his clients and exercise the highest degree of candor, honesty, and fidelity to the courts. These and all the other rules of professional conduct bind him and compel his constant obedience, but

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"Innumerable cases are cited in 16A C.J.S. at pp. 1004 and 1012 et seq.

they have never been considered as violating First Amendment rights.

These regulations apply to appellant now as much as they did before the creation of the State Bar. What integration did was organize the group or body known as the "bar" and give it some means with which to enforce the ethical standards above mentioned and in other ways improve the profession. Whether organized or not, the Supreme Court bar of a state has aptly been described as a "body politic" because it is a body of officers of the court commissioned under the laws of the state and constituting an integral part of its judicial department."

Thus, the group to which appellant was required to belong before integration is the same as the group of which he now must be a member. In each case it includes all those who are licensed to practice law. The only difference is that now the group is organized instead of disorganized, and thus better able to function and discharge the obligations of the profession.

In what manner is appellant's freedom of association or of speech invaded by this change in the bar body politic? As the court below pointed out,

> "The rules and by-laws of the State Bar, as approved by this court, do not compel the plaintiff to associate with anyone. He is free to attend or not attend its meetings or vote in its elections as he chooses. The only compulsion to which he has been subjected by the integration of the Bar is the payment of the annual dues of $15.00 per year. He is as free as he was before

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"From report of special committee to the Conference of Bar Association Delegates in 1920, recommending integration, published in 4 Jour. Am. Jud. Soc. 83, 85 (1920).

to voice his views on any subject in any manner he wishes, even though such views be diametrically opposed to a position taken by the State Bar" (R. 70).

The issue of freedom of association and speech was also raised when a member of the integrated bar of New Mexico refused to pay his annual dues. The court held there was no infringement, saying that the legislature simply seized upon the list of the bar as a body upon which its regulatory measures were designed to act, and respondent's admission as a duly licensed attorney automatically made him a member of that body. *In re Gibson*, 35 N. Mex. 550, 559-561, 4 P. 2d 643, 648-649. It pointed out:

> "In so far as any duties or privileges are created or conferred upon members of the State Bar collectively, they are entirely optional to be availed of or not as the member elects. Every member of the State Bar is privileged to participate by his vote in the selection of the Bar Commissioners, though he cannot be compelled to do so. And the language of section 11 of the act providing for an annual meeting of the members of the State Bar but emphasizes the entire want of compulsion to membership or participation in its deliberations. . . .
>
> "He who does not desire need not attend. Penalty does not attach for non-attendance. And the only detriment suffered for failing to participate in the annual meetings is the loss of the splendid benefits universally conceded to flow therefrom, through an interchange of ideas, discussions for the common good of the bar, and the reading by eminent members of the profession of carefully prepared papers on subjects of current interest." 35 N. Mex. 550, 561, 4 P. 2d 643, 649.

B. *The Hanson Case Settles the Issue of First Amendment Rights in this Case, and Freedom of Association in Particular*

The major error in appellant's concept of freedom of association and speech is his refusal to accept the unanimous decision of this Court in *Railway Employes' Dept. v. Hanson*, 351 U. S. 225. He declares that either the Court did not pass upon freedom of association in that case, or if it did, it was wrong and should reconsider its decision."

Hanson presented squarely the question of the validity of a union shop agreement compelling all employees to belong and pay dues to a union, as authorized by § 2, Eleventh of the Railway Labor Act. The trial court issued an injunction. It was affirmed by the Nebraska Supreme Court, which held that the union shop agreement under § 2, Eleventh, violates the First Amendment because it deprives employees of their freedom of association and also violates the Fifth Amendment because it requires members to pay for many things besides the costs of collective bargaining. This Court reversed, upholding the constitutionality of § 2, Eleventh, and the validity of the agreement.

The Court discussed the background of § 2, Eleventh, noting that by 1950 between 75 and 80 per cent of all railroad employees belonged to independent unions (as distinguished from "company" unions). While non-union members enjoyed the benefits of collective bargaining by the unions, they made no contribution to the support of the unions. To correct this situation, Congress enacted § 2,

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"Appellant's Brief, 41.

Eleventh of the Railway Labor Act to permit union shop agreements.

The issue of First Amendment rights, and freedom of association in particular, was considered and decided explicitly by the Court. "Wide-ranged problems are tendered under the First Amendment," it said. "It is argued that the union shop agreement forces men into ideological and political associations which violate their right to freedom of conscience, freedom of association, and freedom of thought protected by the Bill of Rights" (236). The objections urged were strikingly similar to those of appellant in the instant case. However, the Court put these aside, saying (238):

> "*On the present record, there is no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar.* It is argued that compulsory membership will be used to impair freedom of expression. But that problem is not presented by this record. Congress endeavored to safe-guard against that possibility by making explicit that no conditions to membership may be imposed except as respects 'periodic dues, initiation fees, and assessments.' If other conditions are in fact imposed, or if the exaction of dues, initiation fees, or assessments is used as a cover for forcing ideological conformity or other action in contravention of the First Amendment, this judgment will not prejudice the decision in that case." (Emphasis added.)

The reference to the integrated bar is dictum, of course, but the principle of *Hanson* is just as applicable to the all-inclusive bar as to the all-inclusive union. If there is no

constitutional barrier to the all-union labor organization, there should also be none to the all-lawyer bar organization. Improvement of the legal profession and the administration of justice is to the bar what collective bargaining is to the labor union. It is not unreasonable to compel workers to join together in common efforts and support for bargaining purposes. Likewise, it seems altogether reasonable to require lawyers to join together for the purpose of advancing the interests and standards of the profession. In the case of the bar, there is the added fact that the legal profession is a special calling affected with a public interest and subject to supervisory control, and all members can logically be expected to join in facilitating such regulation and sharing its costs.

Appellant also states that if the *Hanson* case decided there was no violation of freedom of association, this Court erred in not determining whether there was a subordinating compelling interest to permit invasion of such freedom." This assumes there was some question of infringement, but the Court expressly held that on the record before it there was no problem of First Amendment rights. 351 U. S. 225, 238. Consequently, the Court must have felt there was no need for balancing competing interests or finding a compelling interest under such cases as *Barenblatt v. United States*, 360 U. S. 109, 126; *N. A. A. C. P. v. Alabama*, 357 U. S. 449, 463, 466; *Sweezy v. New Hampshire*, 354 U. S. 234, 254; *Watkins v. United States*, 354 U. S. 178, 198; *American Communications Assn. v. Douds*, 339 U. S. 382, 399; *United Public Workers v. Mitchell*, 330 U. S. 75, 96, 102; *Schneider v. Irvington*, 308 U. S. 147, 161.

" Appellant's Brief, 41.

The issue in *Hanson* was one of lawful regulation of labor relations under the Commerce Clause. On this question the Court said (233):

> ". . . Industrial peace along the arteries of commerce is a legitimate objective, and Congress has great latitude in choosing the methods by which it is to be obtained.
>
> "The choice by the Congress of the union shop as a stabilizing force seems to us to be an allowable one."

The wisdom of such regulation is a matter for Congress and not the judiciary, it pointed out (234). "The task of the judiciary ends once it appears that the legislative measure adopted is relevant or appropriate to the constitutional power which Congress exercises" (234). It concluded, therefore, that the requirement for financial support of a labor organization by all who receive the benefits of its work is within the power of Congress under the Commerce Clause and does not violate either the First or Fifth Amendment (238).

The same test of the exercise of regulatory power, it is submitted, applies to the integrated bar. It must be reasonable and not arbitrary or discriminatory, and have a rational relation to the end to be attained; and in choosing the methods for such regulation every reasonable latitude should be allowed the judiciary in which rests the exclusive authority to license and remove those who practice law. See *Ex Parte Secombe*, 19 How. 9, 13; *In re Summers*, 325 U. S. 561, 570-571.

That is not to say there is no compelling interest of the state in integrating the bar, but only that there is no

problem of First Amendment rights. The fair and efficient functioning of the judicial department is a fundamental concern of government. Improvement of the bar and maintenance of high standards will improve the administration of justice. This is a necessary and worthy objective in which the state has a paramount interest. That the integrated bar is a legitimate and effective means of promoting this interest is not based upon conjecture but upon experience with integration in 26 states besides Wisconsin, none of which has gone back to the voluntary form of organization, and by the experience in Wisconsin as evidenced by the statement of the Wisconsin Supreme Court after integration's trial period of two years, that "Under integration the State Bar has increased its services to the lawyers of this state, promoted the high standards of the members of the profession, and increased its contribution to public service and to the administration of law and justice." *In re Integration of the Bar*, 5 Wis. 2d 618, 621, 93 N. W. 2d 601, 602.

C. *The Legislative Activities of the State Bar do not Infringe upon Appellant's Freedom of Speech*

1. *The record in this case on legislative activities of the State Bar does not disclose any infringement*

There was some evidence of both political and legislative activities on the part of the unions in the *Hanson* case. The Nebraska Supreme Court said "it is apparent that some of these labor organizations advocate political ideas, support political candidates, and advance national economic

concepts which may or may not be of an employee's choice." *Hanson v. Union Pac. R. R. Co.*, 160 Neb. 669, 697, 71 N. W. 2d 526, 546. There was evidence that union dues were used to maintain legislative representatives on both the state and national levels (record in Supreme Court, No. 451, October Term, 1955, 125, 126, 135, 136, 144, Exs. 7, 9, 10), to pay for subscriptions to Labor which issued special election editions urging support of candidates for public office (*ibid*, 143, Ex. 10) and for other political purposes (*ibid*, 254-256, Ex. 31).

However, this Court was of the opinion that the record before it was such that it did not present questions of imposing dues for purposes not germane to collective bargaining, or of imposing other conditions of membership, or of exacting dues "as a cover for forcing ideological conformity or other action in contravention of the First Amendment." *Railway Employes' Dept. v. Hanson*, 351 U. S. 225, 235, 238. "It is argued that compulsory membership will be used to impair freedom of expression," it said. "But that problem is not presented by this record" (238).

Likewise, it is submitted, no problem of freedom of expression is actually presented by the record in the instant case, and there is no evidence of any political activities. Appellant's argument about freedom of speech seems to boil down to his objection to the State Bar engaging in legislative activities, but the record discloses no infringement.

This case came up on a demurrer (R. 49) to the complaint (R. 1-48). In Wisconsin a demurrer does not admit conclusions of law, *M. Carpenter Baking Co. v. Dept. of Agriculture & Markets*, 217 Wis. 196, 199-200, 257 N. W.

606, 607, nor erroneous conclusions drawn from facts by the pleader even though they bear the semblance of statements of fact. *Northwestern Mut. L. Ins. Co. v. State*, 173 Wis. 119, 125, 180 N. W. 138, 141. For example, it would not admit the statement in appellant's letter when he paid his dues under protest (R. 47-48), which is made a part of the complaint, to the effect that the State Bar is "authorized and directed to engage in political and propaganda activities" under its rules and by-laws (R. 48); nor do we believe it would admit erroneous generalizations about the functions and activities of the State Bar (R. 5).

As to legislative matters, the allegations of the complaint are general, directed against all legislative services (R. 5). There is no specification of measures on which the bar has taken a stand with which appellant disagrees. The only indication of disagreement on his part is an allegation that the bar opposed legislation which he favored, but there is no clue as to what it was (R. 6). He alleges simply that the bar studies laws relating to the practice and the courts and to various general fields of law and "in furthering its objects and purposes," makes and opposes proposals for changes in such laws (R. 5). There is no indication of the extent of such legislative activities nor of the precise nature of the measures supported or opposed, particularly in the general fields of law mentioned by him, and as to whether they deal with practice and procedure or substantive law or a mixture of both.

In an effort to bolster the record on this point, he asks this Court to take judicial notice of minutes of various meetings of the board of governors and executive committee at which he says specific measures were supported or op-

posed." With the apparent purpose of showing the extent of the bar's legislative activities, he states in his brief[67] that 10 per cent of the time of the executive director is devoted to lobbying on behalf of the bar, citing a report to the Secretary of State made after the court below decided the case.[68] He arrives at the figure of 10 per cent because the State Bar reported $1,400.00, which was 10 per cent of the executive director's annual salary. He has overlooked, however, the fact that the Wisconsin legislature meets every two years and that the report in question covered the 1959 session, which, with several recesses, was spread over 1959 and 1960. Thus, it would appear that 5 per cent would be a more accurate figure to use.[69] Despite his own claim that the executive director devotes 10 per cent of his time to legislative representation, however, he later quotes a wholly inaccurate statement in a research paper to the effect that several states including Wisconsin employ full-time lobbyists during legislative sessions.[70]

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[67]Appellant's Brief, 20-21. His statement is not entirely accurate, nor is the list complete. For example, the minutes in question do not show any position taken on the workmen's compensation bill or the proposal to elect Supreme Court judges by districts, and with respect to the family code bill the recommendation was that legislative action be deferred until further study could be given to its provisions.

[68]Ibid, 19.

[69]The executive director is registered as a lobbyist because of the broad, all-inclusive provisions of the Wisconsin statutes on the subject. Registration is required of anyone who attempts "personally and directly" to influence any member of the legislature to vote for or against a measure, such as by direct or individual communication with him, except that any citizen "not lobbying for hire" may communicate with members of the legislature. Wis. Stats., sec. 13.70 (1). Mere appearance before a committee does not entail registration, but talking to a legislator on a pending bill does require it if the person speaking is being compensated for so doing.

[70]The report states that the lobby activities of the executive director "are incidental to his general work and occupy only a small portion of his time."

[71]Appellant's Brief, 57.

This is the general nature and extent of the record with respect to appellant's contentions on the subject of legislative services. It is plainly insufficient, we submit, on which to base a constitutional objection. Additional facts were judicially noticed by the court below (R. 72), which are discussed in the following section of this brief, but they support appellee's position and not that of the appellant. They spell out the limited scope of the activities actually engaged in and indicate the public purpose served thereby.

2. *The legislative activities of the State Bar are limited in scope, are non-political, and serve a public purpose*

Whatever the State Bar does in the legislative field is limited by its rules and by-laws promulgated by the Wisconsin Supreme Court. Rule 4, § 4, provides for the establishment of various standing committees, two of which are the Committee on Administration of Justice and the Committee on Legislation (R. 14-15). These two committees deal with legislative matters, and their duties are defined by §§ 4 and 9, Art. IV of the by-laws (R. 35-36) as follows:

> "*Section 4. Committee on administration of justice.* This committee shall study the organization and operation of the Wisconsin judicial system and shall recommend from time to time appropriate changes in practice and procedure for improving the efficiency thereof; and in that connection shall examine all legislative proposals for changes in the judicial system."

> "*Section 9. Committee on legislation.* This committee shall study all proposals submitted to the Wisconsin Legislature or the Congress of the United States for changes in the statutes relating to the courts or the practice of law, and shall report thereon to the board of governors; and with the approval of the board of governors may represent the State Bar in supporting or opposing any such proposals."

The court below scrutinized all the legislative activities of the State Bar since it was integrated. It said (R. 72):

> "This court takes judicial notice of the activities of the State Bar in the legislative field since its creation by this court in 1956. In every instance the legislative measures advocated or opposed have dealt with the administration of justice, court reform, and legal practice. Neither the above-quoted by-laws nor the stated purposes set forth in Rule 2 for which the bar was integrated would permit the State Bar to be engaged in legislative activities unrelated to these three subjects."

The court below also dealt with appellant's contention that the legislative activities of the integrated bar are the same as those of the prior voluntary association or of the American Bar Association. Such argument, it said, ignores "the obvious and very material distinction" between legislative activities of the two types of organization. A voluntary organization may take a position on any proposed legislation, but "this is not true of the State Bar, which must confine its activities in legislative matters to those authorized by the rules and by-laws promulgated by this court" (R. 73).

It should be apparent that the legislative activities thus limited are technical, non-partisan, and non-political in character. The State Bar of Wisconsin supports no party candidates and neither advocates nor opposes legislation of a political or partisan nature. Thus, there is involved in the instant case none of the political activities which appear in *International Association of Machinists v. Street*, No. 4, October Term, 1960, now pending before this Court.

The court below was of the opinion "that it promotes the public interest to have public expression of the views of a majority of the lawyers of the state, with respect to legislation affecting the administration of justice and the practice of law, the same to be voiced through their own democratically chosen representatives comprising the board of governors of the State Bar" (R. 75).

It referred to the recent case of *Dulles v. Johnson*, 273 F. 2d 362 (C. A. 2), certiorari denied October 10, 1960 (81 S. Ct. 54), involving the deductibility for Federal estate tax purposes of bequests to certain voluntary bar associations in New York. The question was whether these bar associations were organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, no substantial part of the activities of which is carrying on propaganda or otherwise attempting to influence legislation, within the meaning of § 812 (d) of the 1939 Internal Revenue Code. The Court of Appeals reversed the District Court and allowed the deductions. It discussed a number of bar association activities, including regulation of the unauthorized practice, disciplining the profession, improving court procedure and endorsing judicial candidates, and legislative activities. It found that all of them benefitted the

public and served one or more of the purposes for which the tax deduction is allowed.

Improvement of court procedure and even endorsement of judicial candidates, it said, "clearly constitute a public service" because recommendations as to judicial candidates have been non-partisan, and the "lawyers are peculiarly well equipped to seek out and remedy flaws in the judicial machinery and to assess the performances and capabilities of judges. In today's immensely complex society they alone, perhaps, are alert to watch for and attempt correction of manifest defects prior to the time when malfunctions become apparent to everyone" (367).

With respect to legislative activities, the court found they did not constitute propaganda or represent a substantial part of all the activities of the association. The legislative recommendations are designed to improve court procedure or clarify some technical matter of substantive law, it declared, and are not "intended for the economic aggrandizement of a particular group or to promote some larger principle of governmental policy" (367). Also, the court felt that these legislative activities "serve no selfish purpose of the profession—rather they constitute an expert's effort to improve the law in technical and non-controversial areas," and concluded that they were scientific, educational, and charitable (367).

3. The legislative activities of the State Bar do not prevent any member from expressing his own views and, like such activities of other public agencies, do not violate the constitutional guarantee of freedom of speech

In its 1958 integration decision the Wisconsin Supreme Court pointed out that the State Bar board of governors had adopted working rules and procedure in legislative matters which were fair to all members, and that any member could present any matter to the board at any time. *In re Integration of Bar*, 5 Wis. 2d 618, 621, 93 N. W. 2d 601, 602. These working rules are appended to appellant's jurisdictional statement (42a-46a). They provide that any position taken shall be expressed as the position of the board of governors (43a), instead of the bar as a whole; and that where it is obvious the membership of the bar is of a substantially divided opinion the board shall take no definite position, but in any case may direct that its vote on any measure be reported to the legislature as indicative of the diverse views of the members of the board (43a-44a). The report recommending these rules makes it clear that in taking any position on a pending bill the views expressed should be clearly identified as those of the board, the executive committee, the section, or the standing committee, as the case may be, and not the views of all the lawyers in the state."

Appellant is free, as is any other member of the bar, to express his views at any time on legislative or other matters. He may present them to the board of governors or directly to committees or members of the legislature. He

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"30 Wis. Bar Bull. No. 4, 41, 44 (August, 1957).

may appear at a legislative hearing at the same time that a representative of the board appears and take a position directly opposite to that of the board. At the same time, the fact that he may not agree with some position taken by the board of governors should not deny the free right of the board to take a stand as the duly elected representatives of the profession.

The court below felt that on measures directly affecting the administration of justice and the practice of law, "The general public and the legislature are entitled to know how the profession as a whole stands on such type of proposed legislation. This is a function an integrated bar, which is as democratically governed and administered as the State Bar, can perform much more effectively than can a voluntary bar association" (R. 72-73).

In answer to this, appellant takes the extreme position that neither the public nor the legislature is entitled to such opinions from the bar.[73] He talks vaguely of freedom of the mind,[74] but obviously the court did not mean that every lawyer in the state must speak his mind on every legislative proposal regarding the judicial system and the practice. Through the democratic processes of the State Bar, those who are interested will express their views, and majority rule will govern. Others have the full freedom to remain silent.

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[73]Appellant's Brief, 52-54, 69. Appellant then asks why a poll of lawyers was not taken on the question whether the bar should be integrated (54). An expression of opinion by petition was obtained in 1942 which showed overwhelming endorsement of the integrated bar among those canvassed. See 30 Jour. Am. Jud. Soc. 147, 148 (1947), and 27 Jour Am. Jud. Soc. 13, 16 (1943).

[74]Appellant's Brief, 70-71.

If appellant is correct in his contention that his freedom to speak or not to speak is invaded because he must support an agency which takes positions on legislative matters, then the wheels of democratic government must come to a halt. A few illustrations will demonstrate the error of such position.

One example, cited by the court below (R. 75-76), is the state Judicial Council, supported by taxes which no taxpayer can escape. It consists of sixteen members from the bench, bar, and public, selected in different ways. Among its functions is the duty to "recommend to the legislature any changes in the organization, jurisdiction, operation and methods of conducting the business of the courts which can be put into effect only by legislative action." § 251.181 (2) (f), Wis. Stats.

The Judicial Council recommended a comprehensive court reorganization plan several years ago which many judges and lawyers opposed. Although the legislature rejected this plan, it did adopt the one proposed by the Council in 1959, which also was opposed by a number of judges and lawyers.

Another example is the state Legislative Council which functions in a much larger area. § 13.35, Wis. Stats. It operates with a substantial permanent staff and various committees, studying problems in many government areas, including fields of substantive law and procedure such as the family code on marriage and divorce. It makes recommendations for legislative or administrative action, and except for gifts or grants, is supported by tax monies.

In the Federal government there is, of course, the Judicial Conference of the United States created under 28 U. S. C. § 331. It consists of the Chief Justice of the United States and various other Federal judges and meets annually and in special sessions for the purposes of surveying and expediting the business of the courts and studying and recommending to this Court changes in practice and procedure. In addition, it is authorized to and does frequently make recommendations for legislation to Congress, with which this Court is fully familiar.

Moreover, everyone knows that most public agencies or departments—state and national—devote time and effort to the study of legislative matters affecting them, preparing amendments or changes in the laws, appearing before legislative committees, and talking to legislative representatives. Often the bills are highly controversial and the views expressed by public agencies through their officials or employees are hotly opposed by private citizens.

Yet in all these instances it would be unthinkable to say that the taxes which go in part to defray the expenses of such activities are invalid because some taxpayers may oppose the views expressed by public officials.

The State Bar is a public agency, too, created by the court for a public purpose. There is no constitutional difference, we submit, between it making legislative recommendations and other public bodies doing so.

Appellant has the same right to voice his disagreement on legislative recommendations of the bar as has any citizen with respect to proposals made by any other agency of government. Moreover, the legislative services of the

State Bar are strictly limited to the technical, non-partisan areas of the administration of justice, practice, and procedure. The record does not show that the State Bar has in any way interjected itself into the arena of political action or stepped beyond the bounds delineated by the court.

D. *Appellant has no Constitutional Right of Silence, which would Prevent the Majority from Speaking in order to Protect an Asserted Freedom not to Dissent from the Majority*

Appellant cites many classic First Amendment cases involving suppression of speech or other restraints which abridge constitutional rights. He argues at length that his freedom of speech is just as much invaded when the majority of the bar expresses views with which he disagrees. This forces him to voice his dissent when he might prefer to remain silent, and also makes him speak against the louder voice of the majority. Thus, he claims his right not to speak or not to dissent is impaired.[73]

This asserted right not to dissent is a strange concept of freedom and one impossible to reconcile with the democratic tradition of protecting the rights of the majority as well as the minority. It would compel the group to remain silent in order that the minority need not dissent. The majority is gagged lest it express an opinion not acceptable to the minority, and thus the shield of the First Amendment is turned into a sword.

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[73]Appellant's Brief, 66-69.

The error and danger of such thinking are underscored in two opinions in the field of labor relations, dealing with union political activities. In the first of these, *United States v. C. I. O.*, 335 U. S. 106, a labor organization and its president were indicted under the Corrupt Practices Act for distributing a weekly periodical among its members urging them to vote for a particular candidate in a congressional election. The Court held the act did not forbid unions from circulating newspapers containing such campaign material among its own members in the regular course of business, and therefore the indictment did not state an offense. Justice Rutledge, in a concurring opinion joined in by Justices Black, Douglas, and Murphy, went further, and with respect to unions voicing political views in a campaign to other than its own members, declared that the law restricts the expression of "bloc sentiment" (143), and that First Amendment freedoms involve the right to hear as well as speak, on the part of the electorate or public in general as well as the individual (144). To the extent such right is curtailed the electorate is deprived of vital information, knowledge, and opinion (144). The effect of such restraint is one of "majority prohibition" because if the act is valid, "the accepted principle of majority rule which has become a bulwark, indeed perhaps the leading characteristic of collective activities is rejected in favor of atomized individual rule and action in matters of political advocacy" (147).

In the second case, *United States v. Auto Workers*, 352 U. S. 567, there was presented the question of union election activity aimed at the general public in the form of commercial television broadcasts in a campaign. The District

Court held the indictment did not state an offense, and this Court reversed but refrained from deciding on the constitutionality of the law. However, the constitutional issue was discussed at length in a dissenting opinion by Justice Douglas in which the Chief Justice and Justice Black joined. Justice Douglas dealt incisively with the problem of whether the majority of a group could be silenced in expressing its views because a minority might disagree, saying (596):

> ". . . there may be a minority of union members who are of a different political school than their leaders and who object to the use of their union dues to espouse one political view. This is a question that concerns the internal management of union affairs. To date, unions have operated under a rule of the majority. Perhaps minority rights need protection. But this way of doing it is, indeed, burning down the house to roast the pig. All union expenditures for poltical discourse are banned because a minority might object."

Protection of minority groups, he added, can be no excuse for denying First Amendment rights to the majority. "Some may think that one group or another should not express its views in an election because it is too powerful, because it advocates unpopular ideas, or because it has a record of lawless action. But these are not justification for withholding First Amendment rights from any group—labor or corporate" (597).

Similar sentiments were expressed in *De Mille v. American Federation of Radio Artists*, 31 Cal. 2d 139, 187 P. 2d 769, where the defendant union, operating on a union shop basis, levied an assessment of $1.00 per member for the purpose of opposing a referendum on the question of a state right-to-work law. De Mille, a member of the union,

objected on the ground that his constitutional freedoms were violated; but the court held there was no impairment of such rights, and this Court denied certiorari, 333 U. S. 876. In answer to plaintiff's assertion that payment of the assessment would be an expression on his part contrary to his convictions, the California Supreme Court pointed out that such payment "would not stamp his act as a personal endorsement of the declared view of the majority. Majority rule necessarily prevails in all constitutional government . . . else payment of a tax levied for a duly authorized and proper objective could be avoided by the mere assertion of beliefs and sentiments opposed to the accomplishment thereof. In a government based on democratic principles the benefits as perceived by the majority prevail. . . ." 31 Cal. 2d 139, 150, 187 P. 2d 769, 776.

Thus, protection of the rights of the minority does not mean that the majority must refrain from speaking. The individual cannot impose his rule on the group by invoking a right not to speak. If there is any clash of opinion, it is for the individual to exercise his right to express dissent or remain silent.

The above cases deal with activity clearly political in nature. In the integrated bar and on the record in the instant case there is no political or partisan activity of any sort. A fortiori, there is even less substance to a claimed right not to dissent and less possibility of cause for dissent. In legislative services, for example, the bar is strictly confined to fields which are technical in nature and involve no political ideology.

The important thing is that the rights of the minority are fully protected, and the individual member of the bar

is free to speak his mind at any time. Lawyers are rarely at a loss for words or timid in uttering them, and an opportunity to express dissent is seldom overlooked. As long as each lawyer has the full freedom to express his own views, we think he cannot assert a right of silence which would deny the same freedom to the majority.

V.

THE VALIDITY OF THE INTEGRATED BAR UNDER THE FEDERAL CONSTITUTION HAS BEEN UPHELD IN EVERY CASE IN WHICH THE QUESTION HAS BEEN RAISED

With all of the diligent research which has gone into the appellant's brief, he has failed to come up with a single decision anywhere holding that the integrated bar violates the Constitution of the United States.

There is a multitude of decisions in the state courts sustaining validity in general and compulsory membership fees in particular. There is no conflict in the cases, and whenever the integrated bar has been challenged on constitutional grounds, its validity has been upheld. See annotations in 114 A. L. R. 161 and 151 A. L. R. 617.

Some of the more important cases are as follows:

(a) *Carpenter v. State Bar of California,* 211 Cal. 358, 360, 295 P. 23, 24. In this case suspension for nonpayment of dues was challenged, and the court said:

> ". . . The validity of the State Bar Act as a regulatory measure under the police power has been repeatedly upheld by this court. When that fact is con-

ceded, it follows as a matter of course that the reasonable expenses necessary to pay the costs of enforcement of the Act, in furtherance of the purposes thereof, may be imposed upon the membership in the form of fees or dues. Shaffer v. Beinhorn, 190 Cal. 569, 213 P. 960; Riley v. Chambers, 181 Cal. 589, 593, 185 P. 855, 9 A. L. R. 418; Goer v. Taylor, 51 N. D. 792, 200 N. W. 898."

(b) *Hernon v. State Bar of California*, 24 Cal. 2d 53, 64-65, 147 P. 2d 543, 549-550. Here the constitutionality of the integrated bar was raised in disciplinary proceedings, and the court reiterated its position that the State Bar Act is a valid regulatory measure under the police power.

(c) *Petition of Florida State Bar Ass'n.*, 40 S. 2d 902, 906-907. In this case integration by the court under its inherent power was upheld as a valid regulation of the bar, both as to the requirement of membership and payment of dues. The court pointed out that the state's police power could be exercised by the courts as well as by the legislature, and said at p. 907:

". . . We think the independence of the judiciary is something more than a tinkling cymbal; in fact, we think it means that in those matters which are purely and essentially judicial the judiciary may chart its course without interference from other departments. . . ."

(d) *In re Mundy*, 202 La. 41, 49-51, 11 S. 2d 398, 400-401. This case upholds integration and the compulsory payment of annual dues under the state's police power and under the court's inherent power to regulate the practice of law. "The levying of dues by the Bar Association in a

state which has adopted the so-called integrated bar is merely a form of levying a license tax upon the right to practice law. . . . To say that such license taxes, or occupation taxes, in the form of annual dues levied by the Association, cannot be enforced because they deprive the attorneys of their freedom either to join or not to join the Association, is the same as to deny the authority of the state to organize the members of the bar into an integrated bar, under the state's police power and under the inherent power of the Supreme Court to regulate the practice of law. On this subject see the line-up of decisions in the annotation of the case entitled *In re Integration of Nebraska State Bar Association*, 133 Neb. 283, 275 N. W. 265, 114 A. L. R. 151, loc. cit. 165."

(e) *Ayres v. Hadaway*, 303 Mich. 589, 596-598, 6 N. W. 2d 905, 907-908. The Michigan court held that the act creating the State Bar of Michigan does not violate the due process clause of the United States Constitution and cited cases from other jurisdictions to the effect that the power to regulate the conduct and qualifications of the court's officers does not depend upon constitutional or statutory grounds. Although the judicial power of the court has its origin in the constitution, the court nevertheless comes into existence with inherent powers. Such power includes the right to protect itself, to enable it to administer justice and make rules of practice.

(f) *Petition for Integration of Bar of Minnesota*, 216 Minn. 195, 200, 12 N. W. 2d 515, 518. Here the court held that the exercise of the Supreme Court's power to promulgate an order integrating the state bar would not violate the constitutional rights of any lawyer already admitted to

practice, since the practice of law is not a property right guaranteed or protected by either the state or federal Constitution. Rather it is a privilege conferred on the individual by the court to further the administration of justice. "Lawyers will agree that the administration of justice, the protection of the public, and the safeguarding of the rights guaranteed by the constitution outweigh the court's obligation to maintain the privilege accorded the individual lawyer in admitting him to the practice of law."

(g) *In re Integration of Nebraska State Bar Ass'n.*, 133 Neb. 283, 286-290, 275 N. W. 265, 266-268. This case contains a comprehensive discussion of the court's inherent power to integrate and regulate the bar and of the proposition that this power does not depend upon constitutional or statutory grounds.

(h) *In re Scott*, 53 Nev. 24, 39-40, 292 P. 291, 295. In its opinion here the court concluded that the State Bar Act violated neither the federal nor state Constitution irrespective of whether the practice of law is a privilege or a property right. The court pointed out that in so far as due process is concerned, provision is made for a full and complete hearing of all complaints lodged against a member of the bar; and for a review before the Board of Governors, coupled with a review by the Supreme Court. It also stated that the time had come in the administration of the law when attorneys who constitute an integral and indispensable unit in the administration of justice, should be organized as a body politic, with delegated police power subject to the control of the Supreme Court and the legislature for the benefit of the public welfare in a matter of great public concern.

(i) *In re Platz*, 60 Nev. 296, 302-309, 108 P. 2d 858, 862-864. Here it was held that the State Bar Act was not void as depriving attorneys of property without due process of law and that the State Bar had the right under the police power to collect state bar membership dues from attorneys. Also, it was concluded that the Act does not deprive attorneys of any vested property right or operate as a bill of attainder.

(j) *In re Gibson*, 35 N. Mex. 550, 557-563, 4 P. 2d 643, 647-650. The New Mexico court held that the State Bar Act violated neither the state nor federal Constitution. Among other things, it was pointed out that in so far as compulsion is concerned a member of the State Bar is privileged to vote but is not compelled to do so. It was argued that the penalty for nonpayment of dues denied the equal protection of the laws and resulted in deprivation of property without due process of law in violation of the Fourteenth Amendment to the United States Constitution. This contention was overruled, and it was held that the annual fee could be justified for the purpose of raising revenue or as purely a regulatory exaction.

(k) *Kelley v. State Bar of Oklahoma*, 148 Okla. 282, 282-283, 298 P. 623, 624. In this case it was held that whether or not the right to practice law is a property right, integration is a constitutional form of regulation. The court considered the State Bar to be an arm of the court, and that under the police power of the state and under the necessary power given to the court to perpetuate its existence the right to practice law is a matter subject to the court's regulation. It found nothing in the Act which would justify the court in holding it unconstitutional.

(1) *Integration of the Bar Case*, 244 Wis. 8, 44, 11 N. W. 2d 604, 620. After extended discussion the court concluded that integration "in no way violates the provisions of the Fourteenth Amendment to the Constitution of the United States. It deals with persons admitted to the Bar and all members of the Bar are treated exactly alike. The licensing of business, occupations, and professions has been sustained in innumerable cases. While but few of these cases deal with a fee imposed upon attorneys by order of the court the principle is the same as that which supports the imposition of a fee by the Legislature for similar purposes."

As one writer states:

> "It seems clear in the light of the decisions that all the objections heretofore raised as to the constitutionality of bar integration have now been settled. In every state in which questions as to the validity of these statutes have been raised, their constitutionality has been upheld."[7]

The only authority for the invalidity of any phase of bar integration is an Idaho case in which the bar statute was found to violate a *state* constitutional provision relating to the creation of corporations. *Jackson v. Gallet*, 39 Ida. 382, 228 P. 1068. However, the statute was amended to meet this difficulty, and the court subsequently held integration valid. *In re Edwards*, 45 Ida. 676, 266 P. 665.

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[7]Wicker, **Integrated Bars**, 21 Tenn. L. Rev. 708, 712 (1951); and see Wicker, **The Pros and Cons of an Integrated Bar**, 23 Tenn. L. Rev. 457, 459 (1954).

CONCLUSION

For the foregoing reasons, we believe the rules integrating the bar of Wisconsin violate none of the rights protected by the Fourteenth Amendment.

Any question here of freedom of association seems to have been settled explicitly by this Court in the *Hanson* case. It is difficult to perceive any constitutional basis for saying that it is valid to require all employees to belong to a labor organization but not valid to require all lawyers to belong to a bar organization, particularly when it is already mandatory for the latter to belong to the "bar" and submit to regulation as members of that group.

As to freedom of speech, the objection urged amounts to a denial of the right of the majority to express views with which appellant might disagree. The court below found that all legislative measures on which the bar took a position since integration dealt only with the administration of justice, court reform, and practice,—as authorized and limited by the integration rules. The record presents no evidence of any intrusion into the political sphere, nor of any infringement of appellant's right to express his own views at any time. If the State Bar should ever step beyond the bounds marked out by the rules or deny appellant any right to which he is entitled, he has an adequate remedy against such action.

All that is involved in this case is a moderate form of regulation by the Wisconsin Supreme Court, designed to provide democratic self-government for the whole bar and based upon the principle that all members should join in a common endeavor to improve the profession and its serv-

ices in aid of the judicial process. Long experience with the integrated bar in 27 of our states, as well as abroad, demonstrates its capabilities and its superiority over the voluntary form of organization. In Wisconsin its beneficial results to the profession and the public are already apparent; and the fears of those opposed to integration have not materialized.

The integrated bar imperils no constitutional rights. Instead, it offers a challenge and an opportunity to every lawyer to do his part in a collective effort toward making the profession a more effective instrument for improving the administration of justice, which is basic to the protection of all constitutional rights.

Therefore, it is respectfully submitted that the appeal should be dismissed and certiorari denied, or in the event this Court takes jurisdiction, that the judgment of the Supreme Court of Wisconsin should be affirmed.

Respectfully submitted,

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